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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1949.

No. .....

WILLIAM M. JONES and O. (ORA) C. KING, *Petitioners,*

vs.

A. (ACE) GUTOWSKY, *Respondent.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, William M. Jones and O. (Ora) C. King, pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, which was filed on November 1, 1949, and which became final on December 19, 1949, when such court overruled a petition for rehearing. The decision of the Court of Appeals is reported in 178 F. (2d), p. 60.

Jurisdiction.

The jurisdiction of this Court to review the questions herein presented is invoked under Section 1254(1) of the Judicial Code of the United States, as amended. (Act of June, 1948, c. 646, Sec. 1, 62 Stats. 928; U. S. C., Title 28, Sec. 1254 (1).)

Summary Statement of the Matter Involved.

During the year 1942, the respondent, A. (Ace) Gutowsky, acquired a block of gas and oil leases covering approximately 8,160 acres of land in Oklahoma and Canadian Counties, in the State of Oklahoma, under the terms of which he was required to begin the drilling of a discovery or test well upon such tract on or before September 1, 1942 (Deft. Ex. 9, R. 571-574, admitted R. 315), which time was later extended to January 1, 1943 (R. 612). At such time, it was not known whether any oil or gas underlay such tract and the well so to be drilled by him was designed to ascertain such fact. In August, 1942 (R. 360), he began the development of such leases by moving the necessary drilling machinery to a selected cite on 160 acres constituting a part of such total tract of 8,160 acres, but had no funds with which to pay for the drilling of such test or discovery well (R. 310). It was estimated that the amount which would be required to pay for the drilling of such well to a depth of 7500 feet, as required by the terms of such leases (unless oil or gas in paying quantities were found at a lesser depth), would be $40,000.00 (R. 312).

In the latter part of September, 1942, Gutowsky accompanied by one D. D. Bourland, whom he had employed to assist him in raising such funds (R. 361), entered into an oral agreement with these petitioners by the terms of which they would assist him in raising the funds required by personal solicitation among their business acquaintances, either by themselves or in company with Gutowsky and Bourland, and by directing them to other likely prospects for participation in the furnishing of such sum of $40,000.00 (R. 122), in consideration of which Gutowsky agreed to give to such participants (to be divided among them in proportion to their respective participations), an undivided one-fourth interest in all oil and gas produced from such

160-acre tract on which the test well would be drilled, and to assign to them leases covering one-fourth (2,000 acres) of the remaining 8,000 acres (R. 369), and to compensate these petitioners for their services in so assisting him in securing such funds by giving to them personally an additional one-sixteenth interest in all of the oil and gas produced from such 160-acre tract, and from the acreage retained by him. (R. 122, R. 284)

Following the making of such agreement, the petitioners advised Gutowsky that they would participate personally in, and contribute to such fund of $40,000.00, the sum of $5,000.00 each, and thereafter, in part by themselves, and in part in company with Gutowsky and Bourland, obtained additional promises of business acquaintances of substantial means to participate to the extent of $18,500.00, so that on or about the 22nd day of November, 1942 (R. 631), they had secured or assisted in securing the promised participation, including their own, of a total of $28,500.00 (R. 615). At such time, these petitioners having learned from other sources that one William J. Fox of Chicago, probably would be interested in participating in such project (R. 287-293; Plf. Ex. 2, R. 542, admitted R. 289; Plf. Ex. 23, R. 543, admitted R. 288; Plf. Ex. 8, R. 545, admitted R. 289; Plf. Ex. 4, R. 544, admitted R. 293), advised Gutowsky of such fact and recommended that he and Bourland go to Chicago and solicit the participation by Fox for the remaining amount of $11,500.00 or such part thereof as he was willing to take, it being promised and agreed by these petitioners at such time that if Fox would not participate therein, or would participate for only part of such remaining $11,500.00, they would increase their own personal participation to the extent necessary to make up the full $40,000.00 required. (R. 291-292)

Pursuant to such information and recommendation on

the part of these petitioners, Gutowsky and Bourland went to Chicago and contacted Fox, and on or about December 1, 1942, returned to Marion, Indiana, where they met these petitioners and informed them that Gutowsky had made an entirely new deal with Fox and his associates to take over the entire financing of the drilling of such test or discovery well without any participation whatever by petitioners or the persons whom they had previously contacted; that the previous arrangement between him and petitioners was terminated and that petitioners were entirely out of the transaction. (R. 294, 154, 259-260) However, he assured petitioners at such time that he would take care of them for the services so performed by them. (R. 154)

Under such agreement with Fox and his associates, such test well was drilled and brought in successfully as a producing well, and as a result thereof, the territory surrounding the same, including the entire 8,160 acres covered by such block of leases owned by Gutowsky became recognized as a proven oil field with large underlying quantities of oil, and has since been known as the "West Edmond Oil Field." (R. 309, 35, 652)

Gutowsky and Bourland having divided up all the remaining acreage (R. 195-196; Ex. 12, R. 547, admitted R. 196), and no action having been taken thereafter by Gutowsky to compensate petitioners for the services so rendered by them as promised by him, petitioners brought their action against him in the United States District Court for the Western District of Oklahoma, for breach of contract and for recovery of compensation for services so performed by them, in the sum of One Million Dollars (R. 1-15). The respondent, Gutowsky, as defendant therein, by his answer denied both the validity of his agreement with them and the performance by them of any compensable services (R. 17-21). Following a trial upon the merits, the

District Court held that while the oral agreement between Gutowsky and these petitioners was within the provisions of the Statute of Frauds and was therefore unenforceable, the petitioners were entitled to recover upon a *quantum meruit* basis for the services so rendered to him by them, in that as a result of the efforts, work and information furnished by them to him and Bourland, pursuant to such oral contract, and particiularly, the information regarding Fox, which he and Bourland used and upon which they had acted, he had obtained the necessary finances for the drilling of such test or discovery well; that he and Bourland had received large profits from the production of oil and gas pursuant to the development and sale of their leases and of interests therein; and that a fair compensation for these petitioners, for the services so performed, would be one-fourth of all profits made by such Gutowsky and Bourland. Findings of fact and conclusions of law to this effect were filed by such District Court (R. 33-37), and judgment was rendered accordingly in favor of these petitioners; it being further provided in such judgment for the appointment of a special master or auditor to audit the necessary records, in order to ascertain the amount of such profits and that such court retain jurisdiction for final judgment and determination when the amount of such profits was so ascertained (R. 37-38). A motion for new trial by respondent Gutowsky having been overruled by such trial court (R. 41), an appeal was taken by him to the United States Court of Appeals for the Tenth Circuit on the grounds and urged on appeal, (*a*) that the Statute of Frauds was an absolute bar to any recovery by petitioners as plaintiffs in such action; (*b*) that a certain written instrument dated October 20, 1942, signed by Gutowsky and these petitioners, in which petitioners had personally agreed to contribute $5,000.00 each to such required fund, was void and ineffec-

tive because it was not complete, and (*c*) the plaintiffs cannot recover on *quantum meruit* because they have declared under express contracts. The record on appeal as designated by such appellant, Gutowsky, did not contain the entire record of the proceedings and evidence before the District Court. The Court of Appeals, upon the basis of such incomplete record on appeal, in effect, concluded that the grounds of appeal as set forth in the statement of points to be presented by appellant and as argued and urged in his brief, were not sufficient to justify a reversal of the judgment of the trial court, but that such judgment should be reversed for the reason that the evidence (as shown by such incomplete record on appeal), was insufficient to support the findings of fact made by the trial court, particularly if the testimony of these petitioners and of Gutowsky and Bourland be disregarded and the disinterested testimony of others plus certain written facts and inferences fairly deducible therefrom are considered, and that the trial court's findings are against the great weight of the evidence shown by such record on appeal. (R. 651-661) Accordingly, such Court of Appeals entered its judgment on November 1, 1949, reversing the judgment of the District Court, and directing that the cause be remanded to such court with directions to enter judgment for the defendant Gutowsky. A petition for rehearing (R. 663, *et seq.*) was filed by these petitioners as appellees on December 12, 1949 (R. 686), and on December 19, 1949, the same was denied by such Court of Appeals (R. 687).

Specification of Errors to Be Urged.

The petitioners charge that the United States Court of Appeals for the Tenth Circuit, in violation of Rule 38, Paragraph 5(b) of the Rules of the Supreme Court of the United States (Vol. 8A, F. C. A., Part 2, p. 61), has so far departed from the accepted and usual course of judicial pro-

ceedings, as to call for an exercise of this Court's power of supervision, in the following particulars:

(*a*) Although the Record on Appeal in such United States Court of Appeals for the Tenth Circuit, as designated by such appellant, Gutowsky, did not contain all of the evidence submitted at the trial of said cause in the United States District Court for the Western District of Oklahoma, such United States Court of Appeals disregarded the points designated and urged by appellant as grounds for reversal and, instead, reversed said judgment upon grounds other than those so designated and urged;

(*b*) Although the Record on Appeal in such United States Court of Appeals, as designated by such appellant, did not contain all of the evidence introduced at the trial of said cause in the United States District Court, and although such appellant in the presentation of his appeal did not designate and urge that the findings of fact made by the District Court were not sustained by substantial evidence, such Court of Appeals based its reversal upon such ground;

(*c*) (1) In concluding generally that the Findings of Fact made by the District Court are against the great weight of the evidence and are not sustained by the evidence, without in any manner challenging or designating any specific finding or findings or parts thereof, and without announcing any factual conclusions repugnant to, or inconsistent with, such Findings of Fact or any of them;

(2) In disapproving and rejecting the entire Findings of Fact of the District Court without demonstrating how or in what manner the same or any of them are clearly erroneous;

(3) In disapproving and rejecting the entire Findings of Fact of the District Court without giving due regard to the opportunity of such District Court to judge of the credibility of the witnesses, although most of the evidence adduced at the trial consisted of oral testimony of witnesses appearing at such trial and although there was sharp conflict between the testimony of such witnesses regarding the pertinent and essential facts set out in the Findings of Fact of such District Court;

(4) In reaching its ultimate conclusion that the judgment of the District Court should be reversed on the basis of evidence which was not pertinent or essential to the right of recovery by petitioners on *quantum meruit;*

(5) In assuming unto itself the functions of a trier of facts and in admittedly disregarding substantial and pertinent evidence favorable to the appellees, these petitioners, thereby reaching the erroneous conclusion that the Findings of Fact made by the District Court are against the great weight of the evidence.

Prayer.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain, to be therein named, a full and complete transcript of the record and all the proceedings in the case numbered and entitled on its Docket No. 3890, *A.* (*Ace*) *Gutowsky, Appellant,* v. *William M. Jones and O. C. King, Appellees,* and that the said judgment and decree of the

said United States Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises, as to this Honorable Court may seem meet and just.

And so your petitioners will ever pray.

Respectfully submitted,

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BRIEF *of* PETITIONERS *in* SUPPORT *of* PETITION.

Introductory.

In view of the Summary Statement of the Matter Involved on page 2 of the petition, which sets forth the essential facts and matters on which the claim of right to certiorari is predicated, no purpose will be served by restating the same in this brief.

Such petition for certiorari is based on the fact that the Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise by this Court of its power of supervision. Rule 38, Par. 5(b) of the Rules of this Court, so far as the same is applicable hereto, provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> • • • • • • • •
>
> "(b) Where a Circuit Court of Appeals • • • has so far departed from the accepted or usual course of judicial proceedings • • • as to call for an exercise of this Court's power of supervision."

Our contention is that this has occurred in the instant case in at least three particulars. (See attached petition.) In considering these contentions, it is essential to keep in mind two basic facts:

(*1*) That the appellant designated only a part of the record of proceedings had in the United States District

Court (the trial court) and that such Transcript of Record on appeal as so designated did not contain *all* of the evidence.

(*2*) That the points designated by the appellant to be presented and urged and which were presented and urged by him on such appeal, were disregarded by the Court of Appeals and, instead, the decision and judgment of such United States District Court was reversed on grounds not so designated, presented and urged.

In support of the first of such basic facts, we call attention to the fact that the "Designation of Appellant A. (Ace) Gutowsky for Printing of Record" (R. i) which was filed in such Court of Appeals, but was not included in the "Transcript of Record" filed in such appeal, clearly shows that such respondent designated only certain portions of the record of proceedings in the District Court. This is further indicated by "Appellees' William M. Jones and O. C. King, Designation of Record for Printing" (R. iv) which designated additional portions of such record not included in such designation of record by respondent, Gutowsky, and by the further fact that a supplemental designation of additional evidence to be included therein was filed by such respondent in the District Court following the receipt of the printed Transcript of Record and that, pursuant thereto, a Supplemental Record was printed for inclusion in such Record on Appeal, as shown by the "Clerk's note." (R. 585)

In support of the second of such basic facts, we call attention to the following excerpt (R. 657-658) from the Opinion of the Court of Appeals:

> "While no formal assignment of errors challenging the sufficiency of the evidence to support these findings is set out in the appeal, this is the real issue in

the case and the point which was argued and presented to us by both parties to the appeal."

In addition thereto, we have included in the Appendix hereto a certified copy of "Brief of Appellant" filed in such Court of Appeals, which presents, urges and argues only the three grounds for reversal set forth on page 5 of the accompanying Petition. (See Appendix, pp. 73, 79, 81.) Since it appears from such brief that the point mentioned in such excerpt was not raised, presented, urged or argued by appellant in his brief, it necessarily follows that the only time, if any, at which such point could have been argued and presented to such Court was during the course of the oral argument.

Discussion of Specifications.

SPECIFICATION (a).

The first particular in which petitioners contend that the Court of Appeals has departed from the accepted or usual course of judicial proceedings (Petition, p. 7), is as follows:

"(a) *Although the Record on Appeal in such United States Court of Appeals for the Tenth Circuit, as designated by such appellant, Gutowsky, did not contain all of the evidence submitted at the trial of said cause in the United States District Court for the Western District of Oklahoma, such United States Court of Appeals disregarded the points designated and urged by appellant as grounds for reversal and, instead, reversed said judgment upon grounds other than those so designated and urged.*"

In its Findings of Fact (R. 33-36) the United States District Court found that an oral contract had been entered into between respondent and these petitioners for the performance of certain services by petitioners in connection

with the raising of money to drill such discovery well; that the petitioners had performed such services and that as a result thereof, the respondent and his associate, Bourland, had obtained the necessary funds for such purpose; that as a result of the finances so obtained by them through the efforts, work and information furnished them by petitioners in compliance with such oral agreement, respondent and his assistant, Bourland, have derived large profits; that petitioners have received no compensation for such services; that a fair and reasonable compensation for such services is one-fourth of the profits derived by respondent and Bourland from the development of such acreage; that Exhibit 2 (Agreement of October 20, 1942 (R. 557)) was not the contract between the parties and was not intended to, nor did it, change or alter in any way the oral agreement between the parties as set out in paragraph 4 of such Findings of Fact.

Upon the basis of the facts so found, such United States District Court stated its Conclusions of Law (R. 36-37) to the effect that while such oral agreement as set out in paragraph 4 of such Findings of Fact was unenforceable under the Statute of Frauds, the petitioners nevertheless were entitled to recover upon a *quantum meruit* basis for the services so rendered to the extent of one-fourth of the profits made by respondent and his said assistant. Judgment was rendered accordingly. (R. 37)

It will be noted that the Findings of Fact as made by the District Court and upon which such Conclusions of Law are predicated, were not challenged by the respondent in his brief in the Court of Appeals (Brief of Appellant, Appendix, p. 48) but that the only points upon which his right to a reversal of the decision and judgment of such District Court is based (Appendix, p. 73, 79, 81) are as follows:

"*Proposition I.* The Statute of Frauds is an absolute bar to any recovery by the plaintiffs. (Appendix, p. 73.)

"*Proposition II.* The written agreement dated October 20, 1942, was void and ineffective because it was not complete. (Appendix, p. 79.)

"*Proposition III.* Plaintiffs cannot recover on *quantum meruit* because they have declared under express contracts." (Appendix, p. 81.)

In other words, such respondent by Propositions I and III put in issue the single question of whether paragraph 3 of such Conclusions of Law (R. 36), correctly states the law, such paragraph being as follows:

"3. Even though said contract was unenforceable because of the Statute of Frauds, the complainants are entitled to recover upon a *quantum meruit* basis for services rendered to the defendants."

(Since such District Court expressly held in paragraph 12 of its Findings of Fact (R. 36) that the written agreement dated October 20, 1942, was not the contract between the parties, and entirely disregarded it in arriving at its decision and judgment, it is obvious that Proposition II presented no question on appeal.)

The Court of Appeals in its Decision clearly agreed with such conclusion of law of the District Court by stating (R. 657):

"It is the general law that although a contract may be void and unenforceable because within the Statute of Frauds, yet if one party thereto has performed, he may recover in an action of *quantum meruit* the reasonable value of his services. This is also the law of Oklahoma."

Likewise, it appears from such decision that such Court of Appeals entirely ignored respondent's Proposition II.

Consequently, it follows that in the opinion of the Court of Appeals none of such legal issues so raised and presented by respondent, were adequate or sufficient to warrant a reversal of the judgment of the District Court. But thereupon such Court of Appeals proceeded to determine such appeal, not on the points so urged, but on the question of whether "the court's findings that appellees performed the services required of them and its finding as to the value of such services are sustained by substantial evidence." (R. 657) In other words, although the respondent himself had not challenged the sufficiency of the evidence to sustain such Findings of Fact, and although such Court of Appeals recognized such to be the case when it stated that "no formal assignment of errors challenging the sufficiency of the evidence to support these findings is set out in the appeal" (R. 657), it concluded that such was "the real issue in the case" and, upon that assumption, proceeded to analyze and weigh what it believed to be the pertinent evidence bearing upon such findings.

Had the entire record, *including all of the evidence adduced at the trial,* been contained in the Record on Appeal, the Court of Appeals unquestionably would have had the right on its own initiative to determine whether such Findings of Fact were supported by substantial evidence, even though such point was not presented and urged by the respondent, but where, as in this case, only such portions of the evidence were designated for inclusion in the record as were regarded as being pertinent to the questions of law presented by respondent's propositions heretofore quoted, it was manifestly impossible for such court to determine whether or not there was sufficient evidence adduced at the trial to sustain such Findings of Fact. Assuming for the sake of argument only, that such portions of the evidence

as were included in the Record on Appeal were insufficient to sustain such Findings of Fact, the Court of Appeals did not and could not know that there was not other substantial evidence which had not been designated or included, but which fully sustained such findings. As stated in the case of *Sublette, et al.*, v. *Servel, Inc.* (124 F. (2d) 516):

> "* * * (1) Whether those findings were erroneous could, of course, be determined only from an examination of the evidence which was adduced at the trial. The record on appeal concededly does not contain all of the evidence. It contains only so much of the evidence as was designated by appellants for inclusion in the record, although the appellee, pursuant to Rule 75(b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c, designated other portions of the Reporter's transcript of the evidence which it regarded as essential for the determination of the question which the appellants proposed to have reviewed by this Court. The trial court, on motion of the appellee, entered an order, under Rule 75(b), requiring that the appellants file a transcript of the 'entire record, evidence and the trial of this cause.' This was not done, and the certificate of the trial court shows that it was not done, and that 'incomplete record on appeal is being transmitted to the Clerk of the Eighth Circuit Court of Appeals upon the request of * * *, attorney for appellants.' The record on appeal, clearly, does not comply with Rule 75(g) of the Federal Rules of Civil Procedure.
>
> "(2) It is, of course, obvious that the question presented for review cannot be considered or determined by this court upon the defective record furnished by the appellants. The findings of the trial court are presumptively correct. In the absence of a proper record, shown to contain all of the evidence essential to enable this Court to determine the correctness or incorrectness of

the challenged findings, such findings cannot be questioned on review."

Even though the respondent had included in his designation of points to be raised and presented on appeal the question of the sufficiency of the evidence to sustain any specific finding or findings of fact made by the District Court, such would not be sufficient to require a consideration of such point if the appellant did not follow it up by actually presenting, urging and arguing the same in the prosecution of his appeal. In the case of *General Finance Loan Co.* v. *General Loan Co.*, (8 C. C. A.) 163 F. (2d) 709, it was said:

> "* * * Where a point was set out in appellant's 'points relied upon and intended to be urged,' but was not included in appellant's 'statement of points to be argued and authorities,' the court would regard the point as abandoned or assume that parties conceded that the applicable state law was to the contrary * * *."

In following the course of action as hereinbefore set forth, it is clear that the Court of Appeals departed from the accepted or usual course of judicial proceedings.

SPECIFICATION (b).

The second error charged to the Court of Appeals in the foregoing Petition is as follows:

> "(b) Although the Record on Appeal in such United States Court of Appeals, as designated by such appellant, did not contain all of the evidence introduced at the trial of said cause in the United States District Court, and although such appellant in the presentation of his appeal did not designate and urge that the findings of fact made by the District Court were not sustained by substantial evidence, such Court of Appeals based its reversal upon such ground."

All that has just been said in respect of the first specification of error charged to the Court of Appeals, applies with equal force to the second one, and no purpose will be served by repeating the same.

SPECIFICATION (c).

The third specification in the foregoing petition charges the Court of Appeals with various related errors which will be discussed together and which are as follows:

"(c) (1) *In concluding generally that the Findings of Fact made by the District Court are against the great weight of the evidence and are not sustained by the evidence, without in any manner challenging or designating any specific finding or findings or parts thereof, and without announcing any factual conclusions repugnant to, or inconsistent with, such Findings of Fact or any of them;*

"(2) *In disapproving and rejecting the entire Findings of Fact of the District Court without demonstrating how or in what manner the same or any of them are clearly erroneous;*

"(3) *In disapproving and rejecting the entire Findings of Fact of the District Court without giving due regard to the opportunity of such District Court to judge of the credibility of the witnesses, although most of the evidence adduced at the trial consisted of oral testimony of witnesses appearing at such trial and although there was sharp conflict between the testimony of such witnesses regarding the pertinent and essential facts set out in the Findings of Fact of such District Court;*

"(4) *In reaching its ultimate conclusion that the judgment of the District Court should be reversed on the basis of evidence which was not pertinent or essential to the right of recovery by petitioners on quantum meruit;*

"(5) *In assuming unto itself the functions of a trier of facts and in admittedly disregarding substantial and pertinent evidence favorable to the appellees, these petitioners, thereby reaching the erroneous conclusion that the Findings of Fact made by the District Court are against the great weight of the evidence.*"

In the consideration of these related errors it will be noted that with the exception of a few depositions which were offered in evidence in support of certain minor facts (R. 64-115), and certain Exhibits (R. 542-584), the great mass of evidence adduced before such District Court consisted of the oral testimony of witnesses produced and examined in such court (R. 116-538 and 586-649), and that such evidence "on most points is in sharp conflict." (See Memorandum of District Court, Appendix, p. 31, R. 32.) Such District Court, as shown by such Memorandum, reached the conclusion "that Bourland and Gutowsky made a contract with Jones and King to assist them in raising the money by furnishing the names of prospects. • • • They did furnish the services and they are responsible for Bourland and Gutowsky going to see Wm. J. Fox from whom the money was obtained. • • • The money was raised as a result of their efforts and they are entitled to be paid on a *quantum meruit* basis."

The Findings of Fact are in conformity with these expressions and set out all the pertinent facts essential to such right of recovery on *quantum meruit*. (Appendix, p. 32-35, R. 33-36). On the basis of such essential facts, the District Court concluded as a matter of law that although such oral contract for their services could not be enforced because of the Statute of Frauds, they nevertheless were entitled to compensation for such services on a *quantum meruit* basis. (See Conclusions of Law, Appendix, p. 35, R. 36.)

There is nothing in the decision of the Court of Appeals or the evidence which it discusses therein which contradicts or even tends to contradict the facts so found by the District Court. In fact, such Court of Appeals in its decision expressly recognizes that Count Two of petitioners' amended complaint seeks to recover compensation from respondent for the services so performed by them in aiding respondent in raising the funds for the drilling of such well. (Appendix, p. 42, R. 655-6.) It assumes that the oral contract under which such services were so performed, constituted the agreement between the parties and referred to in such count. (Appendix, p. 44, R. 657.) It recognizes that although such oral contract was unenforceable in view of the Statute of Frauds, yet, if the petitioners performed such services, they are entitled to recover the value of the same in an action of *quantum meruit*. (Appendix, p. 44, R. 657.) Nowhere in its decision does it challenge any specific finding made by the District Court. Nowhere does it set out any facts or factual conclusions repugnant to, or inconsistent with, the facts so found by the District Court or any of them. Instead, it attempts to justify its decision to reverse the judgment of the District Court on the ground that the petitioners "did not perform their part of either the written or oral contract," (Appendix, p. 45, R. 657) and in support of this endeavors to show by certain selected evidence that petitioners did not strictly comply with *all* of the terms of such written and oral contracts which it and the District Court regarded as unenforceable under the Statute of Frauds. (Appendix, p. 44, R. 658-9.) It inferentially admits that petitioners "had first called Fox's name to Gutowsky's attention," (R. 659) but concludes that the services so performed were not sufficient to permit a *quantum meruit* recovery because the petitioners did not, in addition thereto, furnish the balance of funds required to

make up the $40,000.00 originally set as the goal, to meet the cost of drilling such discovery well, as contemplated by such specific contracts. (Appendix, p. 46, R. 659.)

While there is ample evidence in the record to the effect that when Gutowsky and his assistant, Bourland, had obtained the promise of $24,000.00 for the drilling of such well from Fox and his associates, they advised these petitioners that they had made an entirely new deal with Fox and his associates to take over the entire financing of such discovery well and that petitioners were entirely out of the transaction, (R. 154, 259-60, 294) as a result of which any offer by petitioners to furnish such additional $16,000.00 would have been a useless gesture, it is clear that the evidence so detailed by the Court of Appeals to show petitioners' failure to furnish such $14,000.00, has no bearing whatever on the facts set forth in the Findings of Fact, and upon the strength of which the District Court applied the doctrine of *quantum meruit*. Whether petitioners complied with every requirement of all of the various specific agreements is of no moment. The essential facts were that, pursuant to the oral agreement set out in Count Two of their amended complaint (R. 11), they furnish the information regarding Fox to respondent and his assistant, Bourland; that the furnishing of such information constituted services which they had agreed to perform under such oral agreement; that as a direct result of such services the respondent and his assistant, Bourland, obtained the necessary funds to drill such discovery well and bring in the same as a producing well, thereby establishing the West Edmond Oil Field, of which the 8,160 acres held under lease by respondent was a part, as a proven oil field; and that respondent has not compensated these petitioners for the services so rendered.

But even in its analysis of the items of evidence which it regarded as pertinent and which, as we have endeavored to show, have no bearing on the *quantum meruit* issue, the Court of Appeals took upon itself the functions of a trier of facts and, after admittedly disregarding substantial evidence favorable to the appellee petitioners, concluded that the Findings of Fact made by the District Court are against the great weight of the evidence. For example, in reaching the conclusion that the record warrants the statement that petitioners considered their deal with Gutowsky at an end "because of their failure and inability or unwillingness to raise the $40,000.00, and that they did not claim an interest in the project until long after the well came in a producer," (Appendix, p. 46, R. 659) the Court of Appeals reasons as follows (Appendix, pp. 46-47, R. 659-60):

> "Laying aside all their testimony and the testimony of Gutowsky and Bourland, all the disinterested testimony, plus certain facts and inferences fairly deducible therefrom compel this conclusion."

We know of no rule which permits an appellate court in determining the sufficiency of evidence to support the findings of fact found by a trial court, to reject the evidence of parties merely because they are interested in the outcome of the case. The record does not show, nor does the Court of Appeals charge, that these petitioners were not credible witnesses.

Again, the Court of Appeals in its decision (Appendix, pp. 47-48, R. 661) says:

> "Both under Rule 52(a) of the Rules of Civil Procedure and well established equitable principles, we are not bound by the trial court's findings if we are of the view that they are against the great weight of the evidence."

It is petitioners' contention that Rule 52(a), as it has been repeatedly construed and applied in decision after decision, does not permit or warrant the departures from the accepted or usual course of judicial proceedings which have been charged to the Court of Appeals in this case under the various paragraphs of Particular (c) set out in the foregoing Petition (Petition, p. 7) and as repeated in this brief on page 19. It is expressly provided in such rule that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

In construing this language it has been repeatedly said that in determining whether there is sufficient basis in the evidence for the trial court's Findings of Fact, the appellate court is required to take that view of the evidence and the inferences deducible therefrom which is most favorable to the prevailing party. *Skelly Oil Co.* v. *Holloway, et al.*, (C. C. A. 8) (Dec. 21, 1948) 171 F. (2d) 670, 674; *Smith* v. *Porter*, (C. C. A. 8) 143 F. (2d) 292.

It is also well established that an appellate court is not at liberty to disturb findings of fact made by the trial court unless they are unsupported by evidence or are otherwise clearly erroneous, and that this is particularly true where much of the evidence consists of oral testimony and is conflicting, for the reason that the trial judge is better qualified to judge the credibility of witnesses and to resolve any conflicts in the testimony of different witnesses. Nor does the fact that the Court of Appeals might have arrived at a conclusion at variance with that of the trial court change the situation.

This Court in the recently decided case of *Graver Tank & Mfg. Co., Inc.*, v. *Linde Air Products Co.*, (Feb. 28, 1949)

69 U. S. 535, 537, 92 L. ed. 492, in discussing Rule 52(a), said on page 495 of the L. ed. report:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings."

In the case of *Gary Theatre Co.* v. *Columbia Pictures Corp.*, (C. C. A. 7) (1941) 120 F. (2d) 891, it was said on page 894:

> "Whether the trial tribunal be jury or judge, the inferences to be drawn from the facts and circumstances submitted and whether in any particular case the facts justify the ultimate findings are questions for such tribunal subject to revision for error of law. Where parties may differ as to the correct solution of the factual problem faced, it is the duty of a court of review to refrain from attempting to substitute its findings for those of the trial court. It matters not that we might have arrived at a conclusion at variance with that of the trial court. Where as here the trial tribunal has observed the witnesses and made voluminous detailed findings supported by substantial evidence, we are unable to say that the situation contemplated by the rule—that the findings are clearly erroneous—is presented."

Again, in the case of *United States* v. *Protsch*, (C. C. A. 10) (1943) 137 F. (2d) 92, this same Court of Appeals for the Tenth Circuit said on page 94:

> "Certainly there was evidence from which the trial court could have reached a contrary conclusion, but in the light of the whole record, we are unable to say that the judgment of the trial court is not supported by competent and substantial evidence. It is therefore not clearly erroneous and is affirmed."

In the case of *Andrew Jergens Co.* v. *Connor,* (C. C. A. 6) (1942) 125 F. (2d) 686, it was said on page 689:

> "Where a case is tried by the court, a jury having been waived, the court's findings on questions of fact are conclusive upon appeal, no matter how convincing the argument that upon the evidence the findings should have been different, unless there is no substantial evidence to support them. We are bound by the lower court's findings unless they are clearly erroneous."

In *Wittmayer* v. *United States,* (C. C. A. 9) (1941) 118 F. (2d) 808, it is said on page 811:

> "The findings of the trial court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand."

In *Hudspeth* v. *Esso Standard Oil Co.,* (C. C. A. 8) (1948) 170 F. (2d) 418, the court said on pages 419-420:

> "Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., precludes this Court from setting aside a finding of fact in a nonjury case unless the finding is clearly erroneous. This Court has consistently ruled that a finding of fact is not clearly erroneous unless it is without adequate evidentiary support or results from a misconception or misapplication of the law. (Citing many cases.) While it is true that, by virtue of Rule 52(a) of the Federal Rules of Civil Procedure, this Court now acts as a court of review in all nonjury cases, in accordance with the practice which formerly prevailed in equity appeals, it does not retry cases or substitute its judgment for that of the trial court with respect to fact issues if the trial court's determination of such issues is not demonstrably wrong."

One of the best expositions of the construction to be given to the quoted excerpt from Rule 52(a) is that found

in the case of *Skelly Oil Co.* v. *Holloway, et al.,* (C. C. A. 8) (Dec. 21, 1948) 171 F. (2d) 670, in which such Court uses the following language on page 674:

> "The important question in the case is, therefore, whether there was substantial evidence to support the court's finding that defendant negligently failed to find and stop the leaks in plaintiff's installations.
>
> "In the solution of this problem we must take that view of the evidence and the inferences reasonably deducible therefrom which is most favorable to the prevailing party. The power of a trial court in a non-jury case to decide doubtful issues of fact is not limited to deciding them correctly. On review, the question is not what finding of fact the trial court might have reached on the evidence before it, but whether there was substantial evidence upon which the finding which the court made could properly be based. We may not set aside the finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law."

Upon the basis of the foregoing authorities, there can be no doubt that an appellate court is authorized to set aside a finding of fact of a trial court only when there is no substantial evidence to sustain it, or where it is against the clear weight of the evidence, or where it was induced by an erroneous view of the law. None of such reasons exists in this case.

As to the first and second reasons, the Court of Appeals has challenged no specific finding or findings of the trial court, cited no evidence or testimony of any kind repugnant to any of such findings, and reached no factual conclusion inconsistent with any such findings except the general and unsupported conclusion that such "findings are against the great weight of the evidence and that there is

no substantial evidence supporting such findings." (Appendix, p. 48, R. 661.) According to the language of the court in the excerpt heretofore quoted from the case of *Hudspeth* v. *Esso Standard Oil Co.*, (C. C. A. 8) 170 F. (2d) 418, 419-420, such unsupported conclusion is not sufficient in itself, in that the appellate court should not substitute its judgment for that of the trial court with respect to fact issues if the trial court's determination of such issues "is not demonstrably wrong."

Certainly, the third reason, *viz.*, that such findings of fact were induced by an erroneous view of the law, is not present. The Court of Appeals does not challenge the Conclusions of Law stated by the District Court. In fact, it expressly admits (Appendix, p. 44, R. 657) that "although a contract may be void and unenforceable because within the Statute of Frauds, yet, if one party thereto has performed, he may recover in an action of *quantum meruit* the reasonable value of his services."

It therefore follows that the Court of Appeals in committing the several errors charged to it in Specification (c) of the Petition has so far departed from the accepted and usual course of appellate procedure under the provisions of Rule 52(a) as to call for an exercise by this Court of its power of supervision.

Conclusion.

This case is important for two reasons. From a pecuniary standpoint it involves the right of these petitioners to recover one-fourth of the profits realized by the respondent, Gutowsky, and his assistant, Bourland, from the production of the oil and gas underlying approximately 8,160 acres of proven oil land in the West Edmond Oil Field of Oklahoma, and from the development of such holdings in

such field and the sale of such leases and interests therein. While the amount of such one-fourth of such profits has not been and cannot be determined unless and until an audit is made as provided in the judgment of the trial court (Appendix, p. 36, R. 37-38), we feel that it may be conservatively estimated that the same will approach One Million Dollars. In addition thereto, this case is important in that the Court of Appeals for the Tenth Circuit has so seriously disregarded and violated long established principles of appellate procedure as well as the sense and spirit of Rule 52(a) of the Rules of Civil Procedure as to call for an exercise by this Court of its power of supervision.

Respectfully submitted,

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APPENDIX.

Memorandum of Trial Court.

The evidence in this case on most points is in sharp conflict. From consideration of all the facts and circumstances, I am certain that Bourland and Gutowsky made a contract with Jones and King to assist them in raising the money by furnishing the names of prospects. This contract was made after Jones and King had refused to put any of their own money in the deal. They were willing to furnish services but no money. They did furnish the services and they are responsible for Bourland and Gutowsky going to see Wm. J. Fox from whom the money was obtained. They spent time and money on the deal and were promised a share of the leases remaining after the $30,000, not $40,000, was raised. The money was raised as a result of their efforts and they are entitled to be paid on a quantum meruit basis.

Some of the facts are found in spite of the oral testimony of both parties, being the only conclusions the court could arrive at under all of the circumstances and facts in evidence. In some instances the court has been unable to believe the testimony of either of the parties and has had to find the facts from inescapable conclusions drawn from other facts in evidence, the demeanor of the witnesses on the stand and those other elements which a trier of facts must consider.

Copies of the Findings of Fact and Conclusions of Law are being filed herewith.

Jan. 11, 1949.

STEPHEN S. CHANDLER, JR.,
United States District Judge.

Filed January 11, 1949.

Findings of Fact.

1. The complainants, Wm. Jones and O. C. King, are *citizen* and residents of the State of Indiana, and were such at the time of the filing of this action. The defendant, A. (Ace) Gutowsky, is a citizen and resident of the State of Oklahoma. The amount involved exceeds the sum of $3,000, exclusive of interest and costs.

2. The defendant, Ace Gutowsky, in January, 1942, had assembled a block of oil and gas leases in Oklahoma and Canadian Counties in the State of Oklahoma, comprising over 8,000 acres, covering the following described real estate, to-wit:

N2 and the SW4 and the S2 of the SE4 of Sec. 24; the E2 of Sec. 23; the W2 and E2 of SE4 of Sec. 25; and the SW4 of Sec. 26; and W2 and the SE4 of Sec. 35; all of Sec. 36 in Twp. 14 N., R. 5 W., in Canadian County; and

The E2 and the NW4 and the W2 of SW4 of Sec. 1; and the E2 of NE4 and the W2 of Sec. 2; and, the NE4 of Sec. 12, all in Twp. 13 N., R. 5 W., the same being in Canadian County; and

The SW4 of Sec. 19; the W2 of the NE4 and the S2 of Sec. 28; and the S2 and the NW4 of Sec. 29; all of Sec. 30; all of Sec. 31; all of Sec. 32, and the W2 and the N2 of the NE4 of Sec. 33, all in Twp. 14 N., R. 4 W., Oklahoma County, and

The N2 of the SW4 of Sec. 4; the NW4 of Sec. 5; the N2 and the SW4, the SE4 in Sec. 6; the NE4 of Sec. 7 and the N2 of Sec. 8, all in Twp. 13 N., R. 4 W., in Oklahoma County.

The consideration for said leases was the promise of Gutowsky to commence the drilling of a test oil and gas well in the SW4 of Section 32, Twp. 14 N., R. 4 W., in Oklahoma County on or before the first day of September, 1942, said well to be drilled to a depth of 7500 feet unless oil or gas was found in paying quantities at a lesser depth, or said leases would become null and void and of no force and effect.

3. In August, 1942, Gutowsky had commenced the development of *siad* leases by moving in a drilling rig and digging a slush pit upon the drilling site. He was without funds and was unable to obtain the money necessary for the further development of said leases. During the last part of August, 1942, he met D. D. Bourland who had had experience in raising money for similar deals. Bourland was also without funds to proceed with the drilling of the well. Gutowsky and Bourland entered into an oral agreement whereby Bourland would assist in raising the money necessary for the further drilling of the test well. He was to receive therefor a share of the profits with no definite portion thereof agreed upon at that time.

4. About the last of September, 1942, Gutowsky and Bourland went to Marion, Indiana, for the purpose of seeing the complainants, Jones and King. While there they made an oral agreement with Jones and King, who were men of substantial means and well and favorably known, whereby Jones and King would assist in raising the money by furnishing names of persons who might advance money for the venture and, if requested by Bourland or Gutowsky, introduce them to said prospects and assist in interesting them in the deal. For these services Jones and King were to receive an interest in the block of acreage.

5. Jones and King complied with this agreement and a substantial part of the $30,000 necessary to continue with the drilling of the well had been promised by third parties to be paid when the total amount had been raised. During the latter part of November, complainants advised Gutowsky and Bourland that if they could not obtain the balance of the necessary funds from Wm. J. Fox of Chicago that they themselves would advance the balance. Complainants were well able to do so and had theretofore advised Gutowsky and Bourland that Fox, who had just purchased a brewery in Marion, Indiana, was interested in going into the deal.

6. Gutowsky and Bourland used the information con-

cerning Fox, which had been given them by the complainants herein, went to Chicago and entered into a contract with Wm. J. Fox and *has* associates whereby they would furnish enough money to make possible the drilling of the well. Thereafter, and about the 1st or 2nd day of December, 1942, they returned to Marion, Indiana, and advised the complainants that a deal had been made with Fox and his associates to drill the well and that King and Jones would be given nothing for their services, Bourland claiming to have been responsible for obtaining the name of Fox as a prospect.

7. The complainants have received no compensation for their services and have not been reimbursed for their expenses incurred in assisting Gutowsky and Bourland.

8. The test well was drilled and became the discovery well of what is commonly known as the "West Edmond Oil Field."

9. Gutowsky and Bourland have received large profits from the production of oil and gas as a result of the development of their holdings in said field and the sale of said leases and interests therein. Gutowsky and Bourland obtained the finances for the drilling of the said well through the efforts, work and information furnished them by the complainants in compliance with the agreement set out in Paragraph 4. The exact amount of profits is not determined at this time, but that the court retains jurisdiction hereof for future determination thereof.

10. It is customary for the person or persons who raise the money for the development of wildcat acreage, such as that involved in this transaction, to receive one-half of the profits derived therefrom; and that proportion is a fair and reasonable compensation for the services rendered herein.

11. Bourland was paid the full compensation by Gutowsky as if he had been solely responsible for raising the funds. One-half of the compensation was earned by Jones and King.

12. Exhibit 2 was not the contract between the parties. It was obtained by Bourland and Gutowsky some time after the oral contract was made, at the suggestion of Bourland, to show to prospects. It was not intended to, nor did it, change or alter in any way the oral contract between the parties. No one was defrauded thereby. The entire contract between these parties was oral as set out in Paragraph 4.

Conclusions of Law.

From the findings of fact found herein the court concludes as a matter of law the following:

1. The court has jurisdiction of the parties and the subject-matter of this action.

2. The oral agreement set forth in the findings of fact is in violation of the Statute of Frauds and is not an enforceable contract because it provides for transfer of an interest in real estate.

3. Even though said contract was unenforceable because of the Statute of Frauds the complainants are entitled to recover upon a quantum meruit basis for services rendered to the defendants.

4. Complainants, for their services, are entitled to one-fourth of all profits made by Gutowsky and Bourland and an accounting should be had of such profits.

In order to ascertain the amount of profits made by Gutowsky and Bourland a special master should be appointed to audit the books and records of the said Gutowsky and the said Bourland and said auditor should have full power to issue subpoenas and hear and take evidence.

STEPHEN S. CHANDLER, JR.,
United States District Judge.

Filed January 11, 1949.

Judgment.

Now, on this 29 day of Oct., 1948, the undersigned judge of said court, having announced in said cause his Findings of Fact and Conclusions of Law; and the court having found therein the complainants were entitled to judgment against A. (Ace) Gutowsky, the defendant, for one-fourth (¼) of the profits made by A. (Ace) Gutowsky, and D. D. Bourland, jointly and severally.

It Is Ordered, Adjudged and Decreed by this court, that the said complainants have and recover from the defendant, A. (Ace) Gutowsky, one-fourth (¼) the profits made by him, and one-fourth (¼) the profits made by D. D. Bourland, from the West Edmond oil field, located in Township Fourteen (14) North, Range Five (5) West, and Township Thirteen (13) North, Range Five (5) West, in Canadian County; and Township Fourteen (14) North, Range Four (4) West, and Township Thirteen (13) North, Range Four (4) West, in Oklahoma County, all in the State of Oklahoma and that the said complainants are entitled to an accounting for determining the actual amount of said profits, and such accounting be and is hereby ordered.

It is further ordered, Adjudged, and Decreed, that the said Howard E. Cole be, and is hereby appointed auditor and special master, to audit the books and records of the said D. D. Bourland and A. (Ace) Gutowsky, to hear evidence and to make Findings of Fact and Conclusions of Law, and determine the amount of such profits, and to submit the same to the court.

The said special master be, and hereby is, granted all power to issue subpoenas to witnesses and to all things necessary for the determination of the amount of profits so made.

It is further ordered of this court that it retains jurisdiction of this case for final judgment and determination thereof.

It is further Ordered and Decreed that the restraining

order hereto made restraining the said A. (Ace) Gutowsky from incumbering, conveying, assigning or in any manner disposing of his property, be, and the same is hereby continued in full force and effect until the further order of this court.

Stephen S. Chandler, Jr.,
District Judge.

Filed December 15, 1948.

Judgment of United States Court of Appeals, Tenth Circuit.

Nov. 1, 1949.

Gutowsky v. Jones, et al.—No. 3890.

Rehearing denied Dec. 19, 1949.

Action by William M. Jones and another against A. (Ace) Gutowsky to recover the reasonable value of services performed under void oral agreement.

The United States District Court for the Western District of Oklahoma, Stephen S. Chandler, Jr., J., entered judgment for plaintiffs and defendant appealed.

The Court of Appeals, Huxman, Circuit Judge, held that District Court's finding that plaintiffs had performed the services required of them under agreement was against the great weight of the evidence and unsupported by any substantial evidence and reversed the judgment and remanded the cause with direction to enter judgment for defendant.

1. *Frauds, statute of*—key 58(1).

An oil and gas lease conveys an "interest in realty" within Oklahoma statute of frauds and must be in writing to be enforceable. 15 O. S. 1941, Sec. 136.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Interest in Realty."

2. *Frauds, statute of*—key 138(4).

Where one party has performed his part under oral contract which is unenforceable under the statute of frauds,

he may recover in an action of quantum meruit the reasonable value of his services.

3. *Work and labor*—key 28(5).

In action to recover the reasonable value of services rendered under unenforceable oral agreement to assign to plaintiffs in consideration for such services 2,000 acres of leases and an interest in oil produced on described acreage, evidence established that services required of plaintiffs under agreement consisted in raising and making available to defendant the sum of $40,000 to drill an oil well.

4. *Courts*—key 406(1¼).

In action to recover, under equitable principles, the reasonable value of services performed under a void oral contract, under federal rules and established equitable principles, Court of Appeals is not bound by District Court's findings if such findings are against the great weight of the evidence. Federal Rules of Civil Procedure, rule 52 (a), 28 U. S. C. A.

5. *Courts*—key 406(1¼).

In action to recover the reasonable value of services performed under void oral agreement to raise $40,000 needed by defendant to drill an oil well in consideration of defendant's agreement to assign to plaintiffs 2,000 acres of oil leases and an interest in oil produced on described acreage, District Court's finding that plaintiffs had performed the services required of them under agreement was against the great weight of the evidence and was unsupported by any substantial evidence. Federal Rules of Civil Procedure, rule 52(a), 28 U. S. C. A.

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Paul Brown, Oklahoma City, Okla., for appellant; C. R. Nixon and F. C. Swindell, Tulsa, Okla. (Logan Stephenson, Tulsa, Okla., on the brief), for appellees; Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges.

Huxman, Circuit Judge:

In 1942, A.(Ace) Gutowsky had acquired oil and gas leases on approximately 8000 acres of land in what is now

known as the West Edmond Oil Field in Oklahoma. The consideration for these leases, at least in part, required Gutowsky to drill a well on the acreage by a certain time. Shortly before the expiration time for the commencement of drilling operations, he staked a location and erected a rig on one of the leases. Gutowsky was without funds. He entered into an agreement with D. D. Bourland whereby they were to work together in raising the funds in consideration for which Bourland was to receive an interest in the leases. Through Bourland, Gutowsky met William M. Jones and O. E. King, two financially substantial citizens of Indiana. After some efforts, Gutowsky succeeded in interesting Jones and King in the venture and they agreed to subscribe $5,000.00 each, and assist in raising the balance of $40,000.00 needed to drill the well. On October 20, 1942, the written agreement set out in footnote one[1] was

1. "This agreement, entered into this 20 day of October, 1942, by and *getween*, Mr. A. (Ace) Gutowsky of Oklahoma City, Oklahoma, Party of the First Part and the other signers of this Agreement, Parties of the Second Part: Witnesseth:

"Party of the First Part represents and says that he is the owner of Eight Thousand Acres (8000 acres) of Oil Leases in Oklahoma and Canadian Counties, Oklahoma. He further says that he has an Oil Well Derrick erected on the SW4 of Section 32, Township 14 North, Range 4 West, Oklahoma County, a part of said 8000 acres and that he, First Party has entered into a contract with the Kerlin Oil Co. of Oklahoma to *Drill* a well on the above location to a depth of 7500 feet as soon as he can raise the money to pay for the same.

"In order to raise the money to Drill said well First Party proposes to sell and *asign* to Parties of the Second Part Two Thousand Acres (2000 acres) of said 8000 acres of Oil Leases and a one fourth interest in all Oil produced on the above described 160 acres where derrick is located, for the sum of Forty Thousand Dollars ($40000.00) Said $40000.00 to be raised and used as follows:

"Parties of the Second Part agree to pay in cash the amount subscribed here to by each Party and recorded opposite his name; when the sum total of such subscriptions shall amount to the said $40000.00.

"Parties of both Parts, *Mutualy* agree that the money so raised, shall be placed in *escro* in the Marion National Bank, of Marion Indiana to be paid to said Drilling Co. when the well is completed to the depth of 7500 feet.

"Party of First Part also agrees to allow Parties of Second Part to pick their 2000 acres of leases from the 8000 acres by picking Checker Board fashion, 160 acres, or more, leases from the 8000 acres; one of said 160 acres shall 'off set' the 160 acre lease where the well is located.

"Party of the First Part also agrees to properly and *legaly* transfer and assign the said 2000 acres of leases and the one fourth interest of all the oil produced on the 160 acre lease described above in section 32,

drawn up. Considerable time and effort were expended by Bourland and Gutowsky in attempting to secure additional subscriptions to the contract from those whose names were furnished by Jones and King. Jones and King accompanied Gutowsky and Bourland on some of these trips. No other subscriptions to the contract were, however, obtained.

During the time involved Gutowsky and Bourland contacted W. J. Fox and Herbert J. Schmidt of Chicago, and after some negotiations, executed a contract with them in which Fox and Schmidt agreed to advance $24,000.00 toward the drilling of the well. Gutowsky raised the balance of $16,000.00 from other sources and drilled the well. The well was a big producer and the acreage became very valuable.

Thereafter, Jones and King instituted this action against Gutowsky in the District Court of the United States for the Western District of Oklahoma for damages for breach of contract and for an accounting.

Count one of the complaint alleged in substance that on or about the 20th day of October, 1942, D. D. Bourland, acting as agent of the defendant Gutowsky, introduced the plaintiffs to Gutowsky; that on October 20, 1942, the plaintiffs and Gutowsky entered into a written contract attached to the petition as "Exhibit A";[2] that at the time of the execution of the contract, Gutowsky represented that he was the owner of 8000 acres of leases in what may be re-

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to Second Parties as soon as the money is placed in Marion National Bank of Marion, Indiana.

"It is understood and agreed by all Parties of the Second Part that each of them is to benefit in Dividends, Incomes and Royalties from said 2000 acres of leases and the one fourth interest in Oil in proportion to the amount their subscription and payment bears to the total amount subscribed here to. It is further agreed by Parties of the Second Part that upon the completion of *raiseing* the said $40000.00 that they will meet and elect persons from their group to further carry on the business of this agreement.

	"Signed	Amount
"Party of the First Part	A. Gutowsky	
"Party of Second Part:	Wm. M. Jones	$5,000.00
	O. C. King	$5,000.00

Filed October 9, 1945."

2. This is the contract set out in Footnote 1.

ferred to as the West Edmond Oil Field. The complaint further alleged that he breached this contract in the following respects: That W. J. Fox and Herbert J. Schmidt entered into a written contract with Gutowsky to contribute "the balance of said money, the exact amount of which was unknown to these plaintiffs"; that thereafter Gutowsky informed plaintiffs that he was not going to perform his contract with them, "herein denominated Exhibit A"; that they were at all times ready, willing and able to perform their part of the contract and were ready to pay the sum of $5,000.00 each, subscribed by them for their one-fourth interest in the 8000 acres of leases and for the one-fourth interest in the 160 acres on which the well was to be drilled; that by reason of such breach they were damaged in the sum of one million dollars for which they asked judgment.

In a second count, they alleged that on or about October 20, 1942, they entered into an oral contract with Gutowsky in which Gutowsky promised that if they would introduce him and assist him in inducing others to contribute to the venture he would give them the "equivalent of one-fourth of the amount set forth in Exhibit A, $10,000.00. That is to say, that out of the 8,000 acre leases and the 160 acre lease on which the derrick was located, the said defendant would either pay the plaintiffs $10,000.00 for their services by assisting the defendant in raising said money, or would give plaintiffs 500 acres in leases and one-sixteenth interest in the 160 acre leases in the Southwest Quarter (SW4) of Section 32, hereinabove described"; that they accepted his offer; that they introduced the defendant to W. J. Fox and induced Fox to become interested in defendant's venture; and that they performed the services required of them and that defendant breached his contract with them. They alleged further that they had the option to take either the $10,000.00 or to select 500 acres of leases and a one-fourth interest in the 160 acre lease on which the well was drilled. They did not, however, elect either of the options, but prayed for an additional one million dollars damages.

The case was tried to the court. It held that Bourland was a necessary party. An amended complaint was thereupon filed making Bourland a party defendant. The case was tried on this amended complaint. In count one of the amended complaint, plaintiffs departed entirely from count one of the original complaint. They abandoned the written contract on which they sued therein, and now alleged that shortly prior to October 20, 1942, an oral contract was entered into in which plaintiffs agreed to contribute $10,000.00 of the necessary $40,000.00, and to share proportionately with others contributing the balance thereof in an undivided one-fourth interest in the 8000 acres of leases; that thereafter Gutowsky and Bourland asked plaintiffs for a memorandum in writing to show to prospective contributors showing that plaintiffs were contributing $5,000.00 each; that thereafter the memorandum agreement (Exhibit A of the original complaint) was executed October 20, 1942, but that said agreement was merely a prospectus to show to other contributors. The alleged oral agreement set out precisely the same terms and considerations as were set out in the written contract, now denominated a prospectus as to the interest of the subscribers of the $40,000.00 in the block of leases. Count one of the amended complaint also set out the same breach by the defendants as alleged in count one of the original complaint. It contained the additional allegations that at the time of the alleged breach by the defendants, plaintiffs had approximately $28,500.00 promised them by contributors. The prayer of amended count one was that plaintiffs be declared to be the joint owners of an undivided one-fourth interest in the total acreage and that defendants be held as trustees, and for an accounting.

Count two of the amended complaint also departed materially from the allegations of count two of the original complaint. It likewise alleged a second oral agreement under which they were to receive an additional interest for their services in aiding the defendants in raising the balance of $40,000.00. Instead of the $10,000.00 or 500 acres of leases which they alleged in the original complaint they

were entitled to receive, they now alleged that they were to receive an additional on-sixteenth interest in the entire block and that their one-sixteenth interest in the discovery well was to be free and clear of costs to them. The prayer was that they be decreed to be the owners of the undivided interest in the entire acreage. In a third count, they asked for an accounting.

The trial court held that the written contract (Exhibit A) was not the contract of the parties; that it was only a prospectus; and that the contracts between the parties were the oral contracts set out in counts one and two of the amended complaint. The court held that the Statute of Frauds barred recovery on each of these contracts, but since the plaintiffs had performed their part of the contracts they were entitled to recover on quantum meruit for the reasonable value of their services. It permitted plaintiffs to introduce evidence as to the value of such services and found the value thereof to be one-fourth of the profits made by Gutowsky and Bourland. After Bourland was made a party to the litigation, it was ascertained that the Statute of Limitations had run as to him. He was therefore dismissed from the case and no judgment was rendered against him, and the entire judgment was rendered against Gutowsky. An accounting was ordered which was stayed pending this appeal.

[1] The parties are not in agreement whether the original contract between Gutowsky and Jones and King was a written contract or an oral contract. Apparently appellees were not certain in their own minds about this matter. In the original complaint, they sued upon the written contract. They alleged: "That on the 20th day of October, 1942, the plaintiffs and the defendant executed a written contract, a copy of which is attached hereto, marked 'Exhibit A' and made a part hereof the same as if set forth in full herein," and, "That the said defendant breached said contract as follows". When they filed the amended complaint, whatever doubt they may have had as to the character of the contract seems to have been dis-

pelled because they now abandoned all reference to a written contract and alleged that their contract with Gutowsky was oral. But since we have reached the conclusion that appellees did not perform their part of either the written or oral contracts, it is not necessary to resolve this dispute. For the purpose of this opinion, we will therefore, assume that the alleged two oral contracts constituted the agreements of the parties. It is conceded that these oral contracts were void because they violated the Oklahoma Statute of Frauds, 15 U. S. 1941, Sec. 136, which requires that all contracts concerning an interest in real estate must be in writing to be enforceable.[3]

[2] It is the general law that although a contract may be void and unenforceable because within the Statute of Frauds, yet, if one party thereto has performed, he may recover in an action of quantum meruit the reasonable value of his services. This is also the law of Oklahoma.[4] It follows, therefore, that if, in reliance upon these oral contracts, appellees performed the services required of them, equity will award them the reasonable value of such services. While numerous points are urged by the respective parties, the entire matter resolves around the one question of whether the court's finding that appellees performed the services requird of them and its finding as to the value of such services are sustained by substantial evidence. While no formal assignment of error challenging the sufficiency of the evidence to support these findings is set out in the appeal, this is the real issue in the case and the point which was argued and presented to us by both parties to the appeal.

[3] What were the services required of appellees? While appellees' own testimony is confusing and conflicting, we think from the record they were required to raise and

3. Oklahoma has held that an oil and gas lease conveys an interest in real estate within the Statute of Frauds and must be in writing. Harris v. Tucker, 147 Okl. 210, 296 P. 397; Franklin v. Margay Oil Corp., 194 Okl. 519, 153 P. (2d) 486; Hall v. Haer, 160 Okl. 118, 16 P. (2d) 83; Macsas v. Fishencord, 190 Okl. 407, 124 P. (2d) 388.

4. Hall v. Haer, 160 Okl. 118, 16 P. (2d) 83; Macsas v. Fishencord, 190 Okl. 407, 124 P. (2d) 388.

make available to Gutowsky the sum of $40,000.00 to drill the well. This was the consideration for their receipt of 2000 acres of leases and a one-sixteenth interest in the acreage under the well. Thus, Jones testified as follows: "Whose primary duty was it to raise money, yours and King's? A. I presume that would be true, they came to us to get the money." And in the first count of the amended complaint, appellees alleged that after a subscription was obtained from Fox, together with what they had raised, that they would make up the difference, and that they advised Gutowsky that if Fox did not come into the deal at all for him to return and they would personally make up the difference. They also alleged at that time they had approximately $28,500.00 promised to them.

There is not a scintilla of substantial evidence in the entire record that they had raised $28,500.00, or any part thereof, or that they or any other individuals had obligated themselves for one dime. True, they had subscribed $5,000.00 each to the written contract but aside from the fact that they now say that such writing was not a contract but only a prospectus, its terms make it clear that no subscriber was bound until the entire sum of $40,000.00 was subscribed. Neither is there a bit of evidence that anyone had legally obligated himself to contribute anything. Certain of appellees' neighbors were called to testify for the purpose of establishing that they had subscribed money toward this fund. Thus, Ayres testified that he told them he would probably put in $1,000.00 when they got the amount raised. Weinberg testified that he told them he would take $1,000.00. Lohman testified that he thought he told Jones he would take about $2,000.00. Asked if he was ready to make that contribution any time, he replied, "Well, I think I was." Scales testified that he was willing to make a contribution only if it took his contribution to make the $40,000.00. Webb testified that he had agreed to subscribe $2,000.00, but when asked why he did not sign the contract, he replied he was like Scales, waiting for them to go ahead with it. None of

these men were bound; none had put up any money; none could be compelled to contribute because they had not legally bound themselves to do so. It is also clear that appellees did not consider themselves legally bound to underwrite the $40,000.00, notwithstanding that they testified that it was their part of the agreement to secure the $40,000.00, or underwrite that part thereof not secured by subscriptions. We think it is also clear that they were not willing nor did they intend to put up any money at all. Thus, in count one of the amended complaint, they alleged that they advised Gutowsky to see Fox and have him come in on the deal; that they advised him that after he came in they would make up the difference; that if Fox did not come in at all, Gutowsky was to return to them and they would personally make up the difference. Gutowsky did see Fox and secured a $24,000.00 subscription from him. When he returned and advised appellees of these facts, they knew there was still $16,000.00 needed to make up the total sum. Even assuming that appellees had first called Fox's name to Gutowsky's attention, according to their own testimony they were under duty to furnish the balance needed to make up the $40,000.00. Did they offer or ask for the opportunity to put up the balance of $16,000.00? They did not so testify. There is not a single word of evidence in the entire record of 600 pages that they offered or were willing to put up any part of this $16,000.00, and participate in the venture, and were denied the right to do so.

We think the record warrants the statement that they considered their deal with Gutowsky at an end because of their failure and inability or unwillingness to raise the $40,000.00, and that they did not claim an interest in the project until long after the well came in a producer. Laying aside all their testimony and the testimony of Gutowsky and Bourland, all the disinterested testimony, plus certain written facts and inferences fairly deductible therefrom, compel this conclusion.

After the original well came in, appellees bought inter-

ests in three other blocks of acreage which Gutowsky was developing. On July 31, 1943, in writing to Gutowsky concerning one of these ventures, Jones wrote: "I know you are busy and you sure have started a real for sure Oil Boom. How happy I would be to have a little part in it." And in a letter of March 24 to Gutowsky in reference to one of his ventures in which he had an interest, Jones stated: "We know you are doing all you can to make wells on these leases, and if they do not it will be because you *cant* help it. We are glad to be *assiciated* with you even if it is in a small way." And in a letter of November 19, 1944, Jones said to Gutowsky: "But even if I *havent* any of the profit I still like to hear first hand about the success of others." These expressions are not what one would expect from one who felt that he had been wronged by another by repudiation of contractual obligations.

Reverend Garland Howard, Pastor of the Crestwood Baptist Church of Oklahoma City, testified that he had a talk with Jones in the fall of 1944, and asked him if he was interested with Gutowsky in the West Edmond Oil Field, and that Jones replied: "I am not, I wish I was."

Claude Jones, no relation of appellee Jones, testified that in the fall of 1944, he had a conversation with Jones, in which Jones stated that he might have had an interest in this West Edmond Field if he had put up the money.

J. F. Hicks, a Rig Building Contractor, testified that he met Jones and King in Gutowsky's office and had a conversation with them in which he asked them if they could not have been in on this deal, to which Jones replied: "We had our chances to be in on it, but it is just one of those things which *taken* a lot of money and the play wasn't favorable at the time." Jones stated further that: "It turned out all right, but we didn't know enough about the oil business * * *. We hadn't the experience. We have it now."

[4] This was an action in which appellees sought to recover under equitable principles the quantum meruit value of services performed. Both under Rule 52(a) of the Rules

of Civil Procedure, and well established equitable principles, we are not bound by the trial court's findings if we are of the view that they are against the great weight of the evidence.[5]

[5] A consideration of the entire record compels the conclusion that the court's findings are against the great weight of the evidence and that there is no substantial evidence supporting such findings.

The judgment is accordingly reversed and the cause is remanded with directions to enter judgment for the defendant below.

BRIEF OF APPELLANT.

Filed: United States Court of Appeals, Tenth Circuit; Jul. 21, 1949; Robert B. Cartwright, Clerk.

Statement of the Case.

This is an appeal by Ace Gutowsky of Oklahoma City from a judgment rendered by the Honorable STEPHEN S. CHANDLER in favor of Wm. Jones and O. C. King of Indiana for one-fourth of the profits made by Gutowsky who discovered and developed what is commonly referred to as the "West Edmond oil field."

Jones and King claim that they "gave information to Gutowsky" which enabled Gutowsky to obtain funds from third parties which he used in drilling the discovery well.

For convenience the parties will be referred to as they appear in the trial court, that is, Jones and King as plaintiffs, and Gutowsky as defendant.

The case has been tried twice in the United States District Court. The first suit was brought on October 9, 1945, just a short time before it would have been barred by the

5. Rule 52(a), Rules of Civil Procedure, 28 U. S. C. A.; Standard Oil Company of Colorado v. Standard Oil Company, (10 Cir.) 72 F. (2d) 524, 527; United States v. Sands, (10 Cir.) 94 F. (2d) 156, 161.

Statute of Limitations. Gutowsky was the sole defendant in this action. The complaint contained two counts, the first setting up a written contract dated October 20, 1942, between the plaintiffs, as one party, and the defendant as the other party. It alleged in substance that Gutowsky was the owner of 8000 acres of oil and gas leases near Oklahoma City, Oklahoma, and that under the terms of the contract he agreed to give the plaintiffs a one-fourth interest in said block of acreage in consideration of their services in attempting to raise $40,000.00 for him. Because of the breach of the contract on the part of Gutowsky they asked for judgment for $1,000,000.00. The second count of this complaint asked judgment for $1,000,000.00 against Gutowsky alleging the breach of an oral contract by him under which Gutowsky refused to give the plaintiffs an undivided 1/16th interest in the same block of leases for their services in "aiding and assisting" Gutowsky to raise $40,000.00 for the drilling of the well.

At the conclusion of the first trial in May of 1946, the court indicated that in his opinion there were other parties who should be made defendants, and acting on this indication the plaintiffs added D. D. Bourland as a party defendant, amending the complaint and alleging substantially the same contracts and causes of action against Gutowsky and Bourland as had been tried out in the first trial. The case was retried completely and then dismissed as to Bourland on the ground that the Statute of Limitations had run as to him.

The court rendered judgment again Gutowsky for one-fourth of all of the profits made by Gutowsky out of the entire transaction and in addition thereto rendered judgment against Gutowksy for one-fourth of the *profits made by Bourland* even though the court had dismissed the action as to Bourland.

In the complaint and amended complaint filed by the plaintiffs, they set up a written contract and we went to trial expecting to defend under the written contract. Never-

theless, in the second trial of the action, counsel for the plaintiffs in open court stated (R. 240):

> "It is not the contention of these plaintiffs that they had a written contract. Their agreement with these parties has always been considered an oral agreement. The testimony relative to this agreement was that it was prepared at the suggestion of the defendants for the purpose of exhibiting it to the people that they were trying to help to come into this joint adventure."

The court held, after the plaintiffs denied the written contract and were thus claiming under two oral contracts, namely, one for the one-fourth interest and one for the one-sixteenth interest, that the plaintiffs could not recover a one-fourth interest or a one-sixteenth interest in the leases on account of the Statute of Frauds. This relegated the plaintiffs to a recovery, if any they were entitled to, on some other theory and the theory of *quantum meruit* was finally selected by the court as the only theory on which they could recover. The court permitted a recovery not of a one-fourth interest or a one-sixteenth interest in the leases, because that was barred by the Statute of Frauds, but he did enter a judgment of a one-fourth of the profits on the theory of *quantum meruit* for value of services rendered. Nevertheless the plaintiffs, in their second count asked for only a one-sixteenth interest for the value of these same services. The court thus permitted a recovery by indirect means, that is, *quantum meruit,* in an action which the court held was barred by direct means, namely, the Statute of Frauds. The entire basis of the claim of the plaintiffs is founded on what they say is a breach of a contract wherein they agreed to raise $40,000.00 for Gutowsky to drill a well, while all through the record they admitted that they never contributed one cent to Gutowsky for the drilling of the well even though they had signed a contract which required them to raise $40,000.00. For this purported service we are having to defend a judgment which if permitted to stand would cost the defendant Gutowsky many thousands of dollars.

Statement of the Facts.

Early in 1942 Gutowsky began assembling a block of wildcat oil and gas lease acreage which covered approximately 8840 acres located in what is now the "West Edmond oil field." This acreage was looked upon as unfavorable by all of the major companies. It took Gutowsky approximately six months to put this block together and he had to agree with the farmers that he would give them a test well drilled to 7500 feet before he could get the acreage. Gutowsky was completely without funds and was wholly unable to drill the well. All of the time that he was assembling the acreage he was attempting to sell a part of the acreage to the various major oil companies, or any individual who might be interested. He met with no success whatsoever and thought that it would be impossible to drill the well because he could not interest anyone and that he would lose the block of acreage. Finally in September of 1942 he met D. D. Bourland who had had some experience in raising money. Bourland had a slight acquaintance with several people in Indiana, including the plaintiff Jones in this case. Due to the illness of the father of Bourland's wife, it was necessary that he make a trip to Indiana and he invited Gutowsky to make the trip with him thinking that they might interest capital in Indiana in the venture. Bourland and Gutowsky, after some time, agreed that they would attempt to finance the well together by a sale of a part of the leases or an interest therein and that they would divide equally whatever remained after the well was financed. Through Bourland, Gutowsky met Jones and King in Indiana on or about September 29, 1942. In the meantime Gutowsky, by use of his credit, had erected the derrick and dug the slush pits but no actual drilling operations had been commenced because Gutowsky did not have the money. Under Gutowsky's contract with the farmers who owned the land and who had contributed the acreage he was bound to commence drilling operations on or before September 1, 1942. Time was thus extremely short when

Gutowsky made the trip to Indiana and the only thing that had validated his lease contract with the farmers was the fact that the derrick was erected.

The deal was explained to Jones and King and Gutowsky advised them that he would need $40,000.00 to drill the well to 7500 feet. Jones and King at first were not interested but after conferences extending into parts of three days they finally agreed to raise the $40,000.00 It was agreed that Jones and King would take Gutowsky and Bourland to their friends in and around Marion, Indiana, and introduce them and that Gutowsky and Bourland would explain the transaction. Jones and King would then obtain the $40,000.00 from their friends and associates which they would escrow in some bank in Marion, Indiana, and which was to be paid to the drilling contractor. For the sum of $40,000.00 Jones and King and their associates who contributed to the fund were to receive a one-fourth interest of 8000 acres, including a one-fourth interest in the drill site, said one-fourth interest to be 2000 segregated acres.

After several days negotiating and interviewing prospects, a contract was entered into by and between Gutowsky as one party and Jones and King as the other party, which bears the date of October 20, 1942, but which was probably entered into about October 11th or 12th because Gutowsky left Indiana and returned to Oklahoma City on October 12th. This contract is the same contract that is attached to the complaint as an exhibit and is sufficiently important in our opinion to quote in full:

> "This agreement entered into this 20 day of October, 1942, by and between Mr. A. (Ace) Gutowsky of Oklahoma City, Oklahoma Party of the First Part, and the other Signers of this Agreement, Parties of the Second Part, *Witnesseth*: Party of the First Part represents and says that he is the owner of Eight Thousand Acres (8,000 acres) of Oil leases in Oklahoma and Canadian Counties, Oklahoma. He further says that he has an oil well derrick erected on the

SW¼ of Section 32, Township 14 North, Range 4 West Oklahoma County, a part of said 8000 acres and that he, First Party, has entered into a contract with the Kerlin Oil Co. of Oklahoma to drill a well on the above location to a depth of 7500 feet, as soon as he can raise the money to pay for the same.

"In order to raise the money to drill said well First Party proposes to sell and assign to Parties of the Second Part Two Thousand Acres (2000 acres) of said 8000 acres of oil leases and one-fourth interest in all oil produced on the above described 160 acres where derrick is located, for the sum of Forty Thousand Dollars ($40,000.00) said $40,000.00 to be raised and used as follows:

"Parties of the Second Part agree to pay in cash the amount subscribed hereto by each Party and recorded opposite his name; when the sum total of such subscriptions shall amount to the said $40,000.00.

"Parties of both parts, mutually agree that the money so raised, shall be placed in escrow, in the Marion National Bank, of Marion, Indiana, to be paid to said Drilling Co. when the well is completed to the depth of 7500 feet.

"Party of First Part also agrees to allow Parties of Second Part to pick their 2000 acres of leases from the 8000 acres by picking Checker Board fashion, 160 acres or more, leases from the 8000 acres; one of said 160 acres lease shall 'offset' the 160 acre lease where the well is located.

"Party of the First Part also agrees to properly and legally transfer and assign the said 2000 acres of leases and the one-fourth interest of all the oil produced on the 160 acre lease described above in Section 32, to Second Parties as soon as the money is placed in Marion National Bank of Marion, Indiana.

"It is understood and agreed by all Parties of the

Second Part that each of them is to benefit in dividends, incomes and royalties from said 2000 acres of leases and the one-fourth interest in oil in proportion to the amount their subscription and payment bears to the total amount subscribed hereto. It is further agreed by Parties of the second part that upon the completion of raising the said $40,000.00 that they will meet and elect persons from their group to further carry on the business of this agreement.

(Signed)

Party of the First Part — A. Gutowsky

		Amount
Party of Second Part	Wm. M. Jones	$5,000.00
	O. C. King	$5,000.00."

Although the above contract was executed by the plaintiffs and defendant, the plaintiffs have since disavowed the contract with the rather casual explanation that it was simply a "memorandum or prospectus to show their friends." The reason for this *naive* position on the part of the plaintiffs is of course obvious.

The testimony shows conclusively that the plaintiffs never contributed their portion of the money that they agreed to contribute under the terms of the contract and neither did any of their friends and associates put up any money that the plaintiffs so steadfastly contend were ready to put up the money, so it would be impossible for the plaintiffs to recover under this written contract.

Not having a written contract the plaintiffs were of necessity relegated to an oral contract, but instead of one oral contract the plaintiffs come up with two oral contracts claiming a million dollars for raising $40,000.00 in one breath while admitting in the next breath that they never put up the money, and then claiming a million dollars under the second oral contract for inducing their friends to put up some money which was never put up.

Irrespective of what theory the plaintiffs finally select as entitling them to earn such huge profits, it becomes important to ascertain exactly what they did to gain such an interest in a venture of this size.

Clearly the only purpose of Gutowsky and Bourland being in Indiana was to raise money. It is also clear and it was admitted by Jones and King that it was their duty to raise the money for Bourland and Gutowsky in the event they were entitled to receive anything from Gutowsky and Bourland. This is reflected by the testimony of JONES, as follows (R. 232):

> "They said they would give us a fourth interest in these leases if he would give them the $40,000.00 they needed; $40,000.00 to drill this well; that they had arranged for the erection of a derrick and a derrick was already erected on these leases and they needed $40,000.00 to pay for the drilling of a well and completing the well, and if we would give them $40,000.00, or raise $40,000.00, that they would give us a one-fourth interest in the property."

His testimony again, at R. 235:

> "They, (meaning Gutowsky and Bourland), said if we would raise the $40,000.00 they would give us a one-fourth interest in this oil property and a one-fourth interest in the well that was to be drilled with this money and a fourth interest in the remaining wells on the 160 acres on which the original well was to be drilled."

(Supplement, R. 3) Jones:

> "We were to get together, our group, if we raised the $40,000.00, we were to get a fourth interest in the acreage; a fourth interest in the well that was to be drilled and we were to have a fourth interest in the other wells drilled on the 160 on which the discovery well was. That was for the $40,000.00. Then we were to have an interest, Mr. King and I, of a one-sixteenth for helping raise this money."

Jones again at R. 283 stated:

"Mr. Gutowsky was leaving Indiana to come back to Oklahoma, and we discussed this proposition again, in which I said that 'We would like for you to stay here and explain the oil business to these various men that we will take you to because we know nothing about it' and he said, 'I am leaving Mr. Bourland here with you,' and Mr. Bourland says: 'Well, boys, if you are putting in $5,000 let me have your checks.' I said: 'No, we are not giving you a check. We will put this money in escrow.' The agreement was we would get one-fourth interest in the entire acreage, in the entire deal, for those who would go in with us to put up the $40,000.00. Mr. Jones and I agreed to put in $5,000 a piece and at that time he said: 'I want your checks. It is good psychology to show these boys we mean business.' I said, 'No, we will put our money in when we raise it all,' and they had told me by the time they started to drilling the acreage would increase in value."

His further evidence (Supplement Record, page 6):

Q. "Did I understand you to say that you and King were to raise the $40,000.00?

A. We were to help raise it. They were to help raise it. We were to raise it together.

Q. What part in that transaction were you to play?

A. What do you mean?

Q. What were your specific duties?

A. The verbal agreement—the understanding we had even before we wrote up the contract was we were to supply the names of people we knew who probably would be interested in that kind of investment and Mr. Gutowsky and Mr. Bourland were to call upon these people and present this oil proposition to them.

Q. Did you understand that it was Bourland and Gutowsky who were to raise the money or that you were to raise the money, you and King?

A. It was our group which was to raise the money, but they were to help us in raising the money and we were to help them. We were all four interested in it together.

Q. Whose primary duty was it to raise the money, yours and Kings?

A. I presume that would be true. They came to us to get the money."

(Supplement Record, page 21:)

Q. "After this contract was signed, you and Mr. King accompanied these two men, or either of them, to see various prospects did you not?

A. Yes, sir.

Q. You went along, King went along and you made an effort to get these people to subscribe, did you not?

A. That is right.

Q. Did a single one of them sign the contract?

A. No, sir.

Q. Did you ask a one of them to sign it?

A. No, sir.

Q. Did Bourland and Gutowsky, go to see every person, so far as you know, that you gave them a lead on?

A. Finally, yes.

Q. In other words, so far as you know these men acted faithfully and diligently in trying to get these persons suggested by you and Mr. King to sign this contract, and not a one of them signed it?

A. No, sir. We didn't ask them to sign it.

Q. Not a one of them signed it?

A. That is right.

Q. You subscribed $5,000.00 each of the $40,000.00, did you?

A. Yes, sir.

Q. Did you ever pay it?

A. No, sir.

Q. Did King ever pay his?

A. Not that I know of.
Q. Did you ever tender yours?
A. No."

Gutowsky was in Marion, Indiana, from September 29th to October 12th with Bourland and the two of them were working every day interviewing prospects furnished by the plaintiffs. Not one single person ever put up any money or signed a contract to put up any money and neither did Jones or King ever put up their money during that period of time. Gutowsky finally ran completely out of funds and was unable to stay any longer and returned to Oklahoma City. Bourland however remained in Indiana and worked with Jones and King until November 5th, at which time he gave it up as a bad job and returned to Oklahoma City. On the other hand Jones and King maintained that they had $28,500.00 of the $40,000.00 fund raised. This $28,500.00 included the $10,000.00 subscription of Jones and King. Let's therefore look at the testimony of those solicited and see what their testimony is with respect to paying in the money. One of these persons is Ayres, and we will narrate his testimony, which is in substance as follows (R. 75):

> "That he was to put up $1,000.00 when the balance of $40,000.00 was raised; that if it was not raised he was not to contribute; that he never heard of any escrow agreement; that he never signed anything; and in response to whether or not his payment was to be made in cash he said that was not stipulated."

JACOB WEINBERG testified in substance (R. 92) as follows:

> "That he was interested and would take $1,000.00; that he did not learn what the oil deal was; that Jones was to come back if he could raise enough money."

(R. 93:)

> "That he was to put up the money when Jones got a certain sum; that he did not remember what the sum was, and that when it was all raised 'we would have a

mass meeting or something.' (Record, page 94:) that he understood he was to put up the money only when it was all raised; that he was never called upon to put up any money and did not put up any money."

MR. ELMER B. LOHMAN testified in substance (R. 99):

"That he was asked what he was to contribute and he stated as near as he could recall it was about $2,000.00; then he was asked if he was ready to make the contribution at any time he was called upon and he said, 'Well, I think I was'; and at (Record, page 103) he testified that the details were not worked out; that there was never any contract worked out in its final form with him and that some of those details might have prevented him from going into the transaction; (Record, page 104) that there was no specific agreement as to when the money was to be put up and that no one ever made a demand on him for the money."

MR. O. L. SCALES testified in substance (R. 109):

"That the transaction in his mind was not complete; (Record, page 110) that he would contribute $1,000.00 or $1,500.00; (Record, page 108), only if it took his contribution to make up the full sum of $40,000.00; and that (Record, page 110) he did not want to go into it."

MR. C. H. WEBB testified in substance (R. 112):

"That he would subscribe $2,000.00; he was then asked why he did not sign the contract (Record, page 113) and he stated, 'I was like Scales, waited for them to go ahead with it'."

With reference to the testimony of Webb, GUTOWSKY testified in substance (R. 321):

"That he had a conversation with Webb; that he was unable to interest Webb; that Webb finally told him, 'I can't buy nothing.' He says, 'I owe King now.

I have got a stone quarry that makes the finest building stone. If I only had $10,000 I could make a fortune, not like you can in the oil, but I can make a fortune. Can you put me next to it, if a man wants a safe investment. I haven't got any money at all. Have you got any money you would like to put in this deal?' I says, 'I wouldn't be here if I had any money'."

Mr. Carl J. Broo testified in substance (R. 188):

"That he and his partner Gerber were willing to contribute $6,500.00 but was not going to hand out any money promiscuously to anybody; that he would escrow it in the bank; that (Record, page 189) they would go in when they were ready for me to put up the money; that he was never shown any contract; (Record, page 190) that the terms of the contract had never been agreed upon with reference to the deal."

With reference to the Broo testimony, MR. BOURLAND testified in substance (R. 428):

"That never at any time was Mr. Broo asked to put up any money; that his only purpose in going to Mr. Broo was to see Mr. Gerber the employer of Mr. Broo; that Mr. Broo made the appointment for him with Mr. Gerber; that (and we quote verbatim), 'We are here to see you about an oil proposition in Oklahoma.' He said, 'Mr. Broo told me about it but,' he says, 'boys, I want to save a lot of time. I am busy. I have got a lot of war contracts, and I am not interested at all,' so that is as far as we got with Mr. Gerber."

Mr. Bourland was asked (R. 429):

"'How long were you in Gerber's office?' and he answered, 'Probably six or eight minutes; not very long I will tell you that'."

He was then asked if Mr. Gerber or Mr. Broo ever proposed or agreed in writing or otherwise to contribute $6500.00 or any other particular sum and to this question he answered, "Not five cents."

While Bourland was in Indiana, after Gutowsky left, he was staying at the Hotel in which a John Fox, the nephew of Frank and Will Fox, was living. Frank and Will Fox are the recognized largest poultry packers in the world and are the owners of the Fox Breweries which manufacture the Silver Fox beer. This statement is made only for the purpose of identifying them. They are highly esteemed in the business world as men of integrity and honesty.

Bourland became acquainted with John Fox and learned from him that his Uncle Will Fox was interested in oil. He obtained the name, address and telephone number of Mr. Will Fox, who lived in Chicago, Illinois, from his nephew. After Bourland received this information he tried unsuccessfully several times while in Indiana to contact Mr. Will Fox. When Bourland registered in the Sieber Hotel in Oklahoma City, after having returned from Indiana, he again attempted to contact Mr. Will Fox in Chicago and was successful in reaching him and talked with him over long distance telephone. The hotel bill shows the charge for this call. (See Exhibit 17, R. 575.) Bourland attempted to make an appointment but Mr. Fox refused the appointment and advised Bourland, whom he did not know, to state any proposition he had by means of a letter to him. Bourland did not send this letter.

On November 13, 1942, Bourland returned with his wife to their home in San Antonio and about a week later came back to Oklahoma City for the purpose, among others, of going with Gutowsky to Chicago for a conference with Mr. Will Fox, having in mind that if he got to Chicago that Fox would give him an interview. Upon Bourland's return to Oklahoma City from San Antonio, he was advised by Gutowsky that one of the plaintiffs had wired urging him to come back to Indiana for the reason that they had a party who would contribute $30,000.00. Bourland did not want to go back to Indiana because he thought it was useless to see Jones and King any further but at the insistence of Gutowsky, Bourland and Gutowsky left Oklahoma City for Indiana by automobile on or about November 21st, ar-

riving there on November 22nd. They met the plaintiffs and were advised the name of the $30,000.00 prospect and thereupon Gutowsky and one of the plaintiffs contacted this prospect but without success. This prospect Scales intimated that he might, under certain conditions, subscribe as much as $1,000.00 or $1,500.00. Other parties were interviewed but without success. At this point Jones and King stated that they were through with the venture and shortly thereafter Gutowsky and Bourland went by automobile to Chicago for the purpose of attempting an interview with Will Fox in the hope of interesting him in the enterprise. There is a controversy with Bourland on one side and the plaintiffs on the other as to the circumstances under which Gutowsky and Bourland went to Chicago. It is the testimony of Gutowsky and Bourland that the plaintiffs were unable to raise the money, were through and would not have anything more to do with the enterprise, whereas the plaintiffs contend that they urged Gutowsky and Bourland to go to Chicago for the purpose of seeing Will Fox and assured them that if they did not secure the full amount from him, or others, that they would make good the balance. Irrespective of the truth of this controversy the fact remains that not a single penny was paid to Gutowsky or Bourland and neither was a single subscription to the $40,000.00 fund given by the plaintiffs on this second and last trip to Indiana.

The plaintiffs contend that they told Bourland about Will Fox. KING testified in substance (R. 288) that he had a telephone conversation with Mr. Will Fox; that Fox answered the telephone; that he, King, told him who he was, what he was interested in; that Fox stated he was ready to leave for Chicago and that he would see him when he got back and that Bourland was present at the time of this telephone conversation.

MR. WILL FOX testified in substance (R. 160) that the first time he ever heard of Bourland was when Bourland called him from Oklahoma City over long distance; that "he did not know him (Bourland) from Adam and he said

he had an oil deal"; that he told Bourland he was not interested; not to spend his money over long distance; that he did not know him; that if he had anything to propose to write him; that the next time he heard from him (R. 161) was on a telephone call from the Morrison Hotel in Chicago; that as a result of this conversation he made an appointment for a day or so later and did interview him. Fox further testified in substance that he had never talked to Ora C. King or Wm. M. Jones (R. 164); that he did not know them; that neither Jones nor King ever talked to him at the Fox Breweries in Marion, and that the first time he ever heard of the West Edmond deal was when Bourland called him from Oklahoma City on November 12, 1942 (R. 165). Fox further testified (R. 165) that in 1944 information had come to him that Jones and King were claiming they were instrumental in Bourland meeting him and that he, Fox, met Jones and King in Oklahoma City for the first time in 1944, and immediately said to them: "Boys, I understand you are making the claim you are instrumental in my taking a deal with Bourland and Gutowsky. You never; I never met you or seen you; never knew you; never heard of you." Bourland has always maintained that he learned about Will Fox as a prospect from John Fox, his nephew.

MR. JOHN FOX, the nephew, was produced as a witness and testified (R. 407) as follows:

Q. "Do you know the defendant, D. D. Bourland?
A. I do.
Q. About when did you first become acquainted with him or know who he was or where was he at that time?
A. As near as I can remember, about the 15th or 16th of October in the year 1942, he was staying at the hotel in Marion, Marion Hotel.
Q. That is the same hotel where you were staying?
A. That is right.
Q. Do you recall whether his wife was with him at that time?

A. I did not know his wife.

Q. Do you remember the occasion on which you became acquainted with Mr. Bourland, and if so, just state briefly what the situation was?

A. I had seen him around the hotel a few times. His large cowboy hat impressed me to the extent that the middle of October, one day, I walked up to him and introduced myself, and he was sort of reminiscing about the good weather down in Texas; sort of giving me a little ribbing I believe. The weather was inclement at that time, and I told him, 'Hell, it is only the 15th of October.' I says, 'You haven't seen anything yet.' He mentioned that he was going to try and get away from it.

Q. State whether or not on that occasion he advised you where he was from? Did he tell you where he was from in Texas, or do you recall?

A. He didn't definitely say so, but said he would like to be back in San Antonio basking in the sun.

Q. In connection with that introduction, I will ask you whether or not you made any inquiry of him as to what the nature of his business was at that time? Answer that 'yes' or 'no.'

A. Yes, I did.

Q. What did he say in response to that?

A. He said he was there for an oil deal.

Q. Did he say anything more about it?

A. I took him up immediately. I was impressed by that. I said, 'We are also interested in oil,' and I said, 'My uncle, W. J. Fox, is the one that is mostly interested in it.' I said it would probably be advisable for Mr. Bourland to get in touch with him. I gave him the telephone number Kedzie 1000 in Chicago and call for W. J. Fox."

(R. 408:)

Q. "You gave that information to Mr. Bourland in the Marion Hotel?

A. I did.

Q. That was on the occasion you say when you introduced yourself to him?

A. Correct.

Q. How do you fix the time as being about 15th or 16th of October, 1942? Is there anything that impresses that on your mind about what time it was? If so, tell the court.

A. Just by our conversation. I had told him it was only the 15th of October, and he hadn't seen anything yet regarding bad weather."

BOURLAND testified, in answer to a question as to why he left Indiana on November 5, 1942, and whether or not he intended to return (R. 433), that "it was useless to do it; that they were not interested and never would be interested; they had all that time to put up that $10,000.00 and all the people they claimed would put up the money had all that time to put it up and it would not take that long to write a check." He further testified in substance that he had had no success at all in the matter; that no one had subscribed any part of the $40,000.00 except Jones and King, who never put up their money; that he attempted to get King to come to Oklahoma to look at the property and that King agreed to come and set the date for the trip but that he went by to pick up King and King refused to go; that on the second trip to Indiana Bourland testified (R. 446) that he had a conversation with Jones and King, his evidence being:

> "Yes, we had a conversation with them and the people we had previously called on were not interested and they did not know of any new prospects that might be interested so they says, 'Boys, we are sorry we can't go in but we won't go unless we can get some of our friends to go in with us,' and they were more or less through."

That he picked up his maps and geological reports immediately after that conversation.

Bourland further testified that after he and Gutowsky

had made the contract with Fox and Schmitz in Chicago, under which they got $24,000.00, that they immediately returned to Marion and again contacted Jones and King and had another conversation with them, Bourland's testimony being (R. 454):

> "Well, Ace told Mr. King that we needed more money to drill the well and that we have got this much money (meaning $24,000.00), and you fellows come in on this deal, and Ace offered them and begged them to put in $16,000.00 and Mr. Jones and Mr. King said, 'Well, we are not interested; we do not know whether we want to go in it or not.' In fact they were just through at that particular time. Ace kept on begging them and then offered them 1000 acres for $10,000.00 checkerboard within a mile of the well and still they turned that down; then he came down from 1000 acres to 500 acres and they turned that down; then he finally came down from 500 acres to 80 acres and he offered to sell them 80 acres for $400.00 and then Mr. Jones offered him $100.00 for the 80 acres. We did anything in the world we could to sell them something because we were thoroughly stalled. We wanted to get the money and drill this well; we had that much and wanted to get anything they were willing to put up."

Bourland further testified, (R. 455) in substance that at that time he advised them about obtaining $24,000.00 from Fox and asked Jones and King to put up $16,000.00 for which they were to get additional acreage, and that the attitude of Jones and King was that they were not interested; that Jones and King said they were through and that they could not get any of their friends in, and for that reason they were through. Bourland emphatically denied that Jones or King, or any of their friends, ever mentioned or suggested the name of Fox to him.

GUTOWSKY testified in substance (R. 327), that he came on back to Oklahoma City from Indiana because he could not do any good up there and gave it up as a bad

job; that he had been unable to get Jones and King to put up any money; that he begged them to even underwrite the deal, meaning that if they would agree to put up the $40,000.00 that he, Gutowsky, would sell enough acreage for them after the well was started to return their money and leave them some acreage; that Mr. King sought advice from a friend of his in the finance business in Indiana and this friend advised King that "if it is as good as that man claims, I know a dozen millionaires in Tulsa and some in Oklahoma City, and he would not have to come to Indiana to try and sell it," and that King completely turned him down; that at the time he had $6.00 in cash.

After Gutowsky and Bourland returned to Marion from Chicago, and after having obtained $24,000.00 from Fox, Gutowsky again saw Jones and King and invited them to buy some acreage but that King stated, (Record, pages 344-345), that "I do not know." He says, "I tried my best here and it don't look like anybody wants to go down to Oklahoma and invest in the thing. They are all afraid," and along that line. We talked about it first. He said: "I would like to get in some way." I says: "Fine. Go right on here and get in on this deal. I need some money. I can't drill the well. I have got to furnish the fuel and pipe and I haven't got the money."

Gutowsky further testified in substance (R. 345-346), that he offered them 1,000 acres for $10,000.00; that he begged them to take it; that he offered them acreage for $20.00 an acre; that King positively refused; that he, Gutowsky, had 6000 acres left at the time; that he finally got down to offering them 80 acres at $5.00 an acre and that Jones offered to buy an 80-acre lease for $100.00; that this was the sole and only offer he ever had from either Jones or King; that at this time he, Gutowsky, was completely without funds and wrote a check to the Marion Hotel for $50.00, which was cashed, but first advised the hotel that the money was not in the bank to cover it. The check, however, was honored when presented.

Gutowsky further testified that it cost $52,000.00 to drill the well and that when he returned to Oklahoma he traded leases for fuel, for a derrick, to his groceryman for groceries, and offered the leases to every person he could possibly see for from $5.00 to $10.00 an acre in order to raise additional funds to complete the well.

After Gutowsky completed the well as a producer, correspondence passed back and forth between Gutowsky and Jones. As a result of this correspondence, Jones and King invested in three other drilling ventures with Gutowsky in other parts of Oklahoma. These deals were in no way associated with the West Edmond oil field. In the letter of July 31, 1943, from Jones to Gutowsky, Defendant's Exhibit 2 (R. 560), Jones stated:

> "I know you are busy and you sure have started a real for sure oil boom. How happy I would be to have a little part in it."

His letter of March 24, 1944, to Gutowsky, Defendant's Exhibit 4 (R. 561), in referring to these three other outside ventures, stated:

> "We know you are doing all you can to make wells on these leases and if they do not it will be because you can't help it. We are glad to be associated with you even if it is in a small way."

This reference to being associated "even if in a small way" had reference to their other ventures in Oklahoma acquired a year or so later.

In a letter dated November 19, 1944, Defendant's Exhibit 5 (R. 562), Jones said to Gutowsky:

> "But even if I haven't any of the profit, I still like to hear first hand about the success of others."

In a letter from Gutowsky to Jones, dated May 3, 1943, Defendant's Exhibit 7 (R. 565), Gutowsky chided him for refusing to come into the venture in this way:

> "I promised you in my letter to send you a few

newspaper clippings about my well and I am enclosing them herewith. Now understand I am not trying to rub it in on you boys but you missed one of the biggest fortunes I believe you will ever have an opportunity to get in on. * * * Since you fellows did not come in on the deal I made on the 1000 acres I had to let the companies in on it. * * * Tell my friend Mr. King hello for me and I wish him all the good luck in the world even if he did not make a deal."

Along this same line is the evidence of REVEREND GARLAND HOWARD, Pastor of the Crestwood Baptist Church of Oklahoma City, in which he stated in substance that he met Jones in the office of Mr. Gutowsky in the fall of 1944, and at page 398 of the record this evidence was given:

Q. "What was said between you and Mr. Jones at that time?

A. We were discussing the Church and we got to discussing the West Edmond field and I asked him if he was interested with Mr. Gutowsky in the West Edmond field.

Q. What did he say?

A. He said, 'I am not, I wish I was'."

MR. CLAUDE JONES (R. 218) testified in substance that he met Mr. Jones, the complainant, in the office of Mr. Gutowsky in the fall of 1944, and that "during the course of the conversation, Mr. Jones mentioned that he might have had an interest in this West Edmond field if he would have put up his money."

MR. J. F. HICKS, Rig Building Contractor, testified that in 1943 and 1944 he was officing in an adjoining office to Mr. Gutowsky; that he met Jones and King in Gutowsky's office in 1944 and that he had the following conversation with Jones (R. 224):

A. "Well, Mr. Gutowsky left the room, or the office,

rather, and Jones and I drummed up a little conversation, and he asked me was I building many rigs, and I told him about how many I was building and how everything was going and so he said, 'You could have been in on that deal out there, couldn't you?' I said, 'Yes, I could.' Well, he said, 'We had our chances to be in on it, but' he said, 'it is just one of those things which taken a lot of money and the play wasn't favorable at that time,' and he said, 'It turned out all right, but' he said, 'We didn't know enough about the oil business,' or something to that effect. 'We hadn't had the experience. We have it now'."

At this point we desire to again return to the situation of Marion, Indiana, just after Gutowsky and Bourland had returned from Chicago and had entered into a written agreement with Fox in Chicago wherein Fox agreed to contribute $24,000.00. Jones and King contend that they were ready to put up $28,500.00 and claim a performance of the contract on their part because they claim they were instrumental in causing Fox to contribute $24,000.00.

It is an admitted fact that Jones and King knew that Gutowsky and Bourland wanted $40,000.00; it is also admitted that they only obtained $24,000.00 from Fox. We ask what was to prevent Jones and King from contributing $16,000.00 and taking a pro rata amount of the acreage? The version of Jones and King is that Gutowsky and Bourland refused to let them in saying that they sold the whole 2,000 acres to Fox. It is admitted that Gutowsky had over 8,000 acres to trade with. It is further admitted that Fox only took 1,840 acres, plus a one-fourth interest in the drill site. This still left Gutowsky with approximately 6,000 acres and a three-fourths interest in the drill site, which was certainly several times more than enough to meet his commitment to Jones and King had they been willing to proceed. It doesn't stand to reason that Gutowsky and Bourland, being completely without funds, and having in

their possession only approximately one-half of their known requirements to drill the well, would refuse to accept any money from Jones and King regardless of the amount tendered. As a matter of fact the well did cost $52,000.00 and when Gutowsky and Bourland returned to Oklahoma City and commenced the well they again solicited funds from every source possible with which to complete the well. Defendant's Exhibit 21 (R. 578) is a summary of all Gutowsky sold more than thirty days after this last visit with Jones and King. It shows numerous sales to various companies at the approximate average sum of $10.00 per acre. It shows an 80-acre lease to Jess Hemby for a rental on the rig. It shows a sale to R. G. Sieber of 80 acres for $300.00 which Gutowsky used to pay a grocery bill. A summary of this exhibit shows 2,440 acres delivered for a total consideration of $26,160.00. It took effort on the part of Gutowsky to make these sales and if the plaintiffs' position is correct, Gutowsky could have delivered 2,000 acres to them for $40,000.00. We say that men simply do not act in that fashion and certainly not men who were as desperate for cash, and as anxious to make a deal as Gutowsky and Bourland were in this instance. The truth of the matter is that Jones and King absolutely refused to go into the venture on any basis. We admit that they did make some effort in the first instance to put the enterprise over but when they met with a cold reception from their associates and acquaintances in Marion they lost interest in the deal and this interest was only revived a short time before the statute of limitations would have run upon their claim within which time they could have brought the suit.

We think their statement to Reverend Garland Howard to J. F. Hicks and to Claude Jones is the true picture of the situation when they stated to them that they "had a chance to go in the deal and turned it down." This same thought is expressed by Jones in his letter to Gutowsky when he stated, Exhibit 2 (R. 560), "How happy I would be to have a little part in it," and again he wrote on March 24, 1944, and stated, Exhibit 4 (R. 562), "We are glad

to be associated with you even if it is in a small way," and in his letter of November 19, 1944, when he stated, Exhibit 5 (R. 562), "But even if I haven't any of the profit I still like to hear first hand about the successes of others."

On the other hand we have men with known integrity like Wm. J. Fox who was an impartial witness and who testified in substance that he never heard of either Jones or King; that the first time the deal was ever mentioned to him was by Bourland over long distance telephone. We have the disinterested statement of JOHN FOX his nephew, that he met Bourland in the Marion Hotel on October 15, 1942 and when he learned what business Bourland was in he suggested that he call on his uncle, Will Fox, in Chicago, and gave him his telephone number. We have innumerable statements by Gutowsky and Bourland that they did everything within their power to interest both Jones and King as well as their associates in the venture but that they met with no success whatsoever.

Gutowsky was in Indiana on the first trip from September 29th to October 12th, and although he got the signatures of Jones and King on the contract he never obtained any money from them and was never able to interest any of their associates in the venture. Bourland had testified innumerable times in the record that during all of the time he was in Marion, from September 29th to about November 5th, that he was never able to interest anyone at all in the venture. Added to this is the statement of three disinterested Oklahoma Citians who had conversations with the plaintiffs and the plaintiffs admitted to them that they had an opportunity to invest in the venture but turned it down.

On the other side we have men of the record of Jones. [He was convicted of a felony and served five years in the Federal Penitentiary on a mail fraud and conspiracy charge (Supplemental Record, p. 18)] and King who are directly interested in the results of this litigation. They have made no explanation of their delay in making a demand on Gutowsky and Bourland for an interest in the venture and

neither do they explain why, after having been cheated, so they claim, by Gutowsky in the West Edmond deal, that they returned to Oklahoma City a year or two later and entered into three other wildcat ventures with Gutowsky on deals involving leases in other parts of Oklahoma.

It is our firm conviction that the court has permitted them to recover in an action when a demurrer to the evidence should have been properly sustained by the court.

THE LAW OF THE CASE.

PROPOSITION I.

The statute of frauds is an absolute bar to any recovery by the plaintiffs.

Although the trial court held that the plaintiffs could not recover an interest in the leases themselves because of the statute of frauds, the court nevertheless permitted a recovery of an undivided one-fourth interest in the profits made by Gutowsky *and* Bourland which we say is attemping to arrive at a judgment by indirect means which the court admitted was precluded by direct means. Nevertheless it is our position that the statute of frauds bars any recovery whatsoever by the plaintiffs.

The applicable statute of frauds of the State of Oklahoma is Title 15, Section 136, O. S. 1941, and is as follows:

> "The following contracts are invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent."

Section 5 of that statute is:

> "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, un-

less the authority of the agent be in writing, subscribed by the party sought to be charged."

Oil and gas leases have been held to be such an interest in real estate as are intended to be covered by the statute.

With reference to the case of *Nicholson Corporation* v. *Ferguson*, 114 Okl. 16, 243 Pac. 195, the Oklahoma Supreme Court held:

"The granting clause of the oil and gas lease in the instant case recited that the lessors have granted, demised, leased and let by these presents do grant, demise, lease and let unto the lessee all the oil and gas in and under the land; also the said tract of land for the purpose of entering upon, operating and removing therefrom oil and gas for a term of five years and as much longer as oil and gas is produced thereon; held, that this lease granted an estate in the realty covered thereby."

Numerous other decisions have held similarly and there is no reason for burdening this Court with a fundamental rule of law.

In the case of *Macsas* v. *Fishencord*, 190 Okl. 407, 124 P. (2d) 388, decided in 1942, it is held:

"*Statute of Frauds*: An oral agreement whereby one person agrees to render service in connection with the procurement of oil and gas leases for an interest in the leases so obtained is within the Statute of Frauds and unenforcible."

In *Hall* v. *Haer*, 160 Okl. 118, 16 P. (2d) 83, the court holds:

"Oral agreement of land owner to convey undivided interest in minerals in consideration for services to be rendered, held within Statute of Frauds.

"Mere performance of service under oral agreement of land owner to convey interest in minerals is insufficient to take contract out of Statute."

From the body of the opinion we quote the following:

> "Among other grounds set out in the demurrer is the general ground that the petition fails to state a cause of action against the defendant. Under the rule of law announced in *Hall* v. *Haer*, 160 Okl. 118, 16 P. (2d) 83, and other cases, an oral agreement whereby one person agrees to render services in connection with the procurement of oil and gas leases for an interest in the leases so obtained is within the statute of frauds and unenforceable. In so far as the plaintiff's petition upon which this case was tried could be considered in the nature of an action for specific performance, it cannot be maintained."

In *Flowers* v. *Poorman*, (Ind.) 87 N. E. 1101, this rule is settled:

> "A parol contract to convey land in consideration of services rendered is unenforceable under the Statute of Frauds."

Referring to the court's decision in this case, wherein the plaintiffs have asked for an undivided 1/16th interest for the value of services rendered, the decisions above quoted clearly hold that an interest in the leases could not be granted under the Statute of Frauds. We say that there is no difference between granting an undivided one-fourth interest in the leases and granting an undivided one-fourth interest in the profits made from those same leases.

In *Garrett* v. *Gerard*, (10th Cir.) 156 F. (2d) 227, in construing the Oklahoma Statute of Frauds the following rules are announced:

> "2. Under Oklahoma Statute, an oral contract for sale of realty is invalid, and no action will lie, either for specific performance or for damages for its breach. 15 O. S. 1941, Sec. 136.
>
> "3. A written memorandum of contract for sale of realty must be a complete contract in order to comply with Oklahoma Statute of Frauds, and no part of the contract can rest in parol. 15 O. S. 1941, Sec. 136."

In the case of *Harris* v. *Tucker*, 147 Okl. 210, 296 Pac. 310, the second syllabus reads:

> "Under the Statute of Frauds of this State all contracts for the leasing of real estate for a longer period than one year are invalid unless the same or some note or memorandum thereof be in writing, and an assignment of such lease, to be valid, must also be in writing."

In the body of the opinion we find this:

> "An agreement for the sale of real property or any interest therein is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party being charged and an oil and gas mining lease is such an interest as is contemplated by the Statute."

In *Franklin* v. *Margay*, 194 Okl. 519, 153 P. (2d) 486, the court found that an oil and gas lease is an interest in real estate and then goes on to say:

> "It is well settled that the memorandum in case of a contract to sell land, must describe the land sold. If an insufficient description is given or there is no description, oral evidence is not admissible in aid of the memorandum, because the court will never receive such evidence, both to describe the land, and then to apply the description."

Referring again to the evidence in this case, the plaintiffs have abandoned their written contract. They are therefore claiming an interest under oral contracts. Jones and King in their evidence on the witness stand and in their answer to interrogatories admitted on more than one occasion that the 2,000 acres that they were entitled to receive under the contract was never described, identified, or otherwise determined. We ask the pertinent question of who was to select the 2,000 acres and in what manner was such 2,000 acres to be selected since it was not otherwise determined.

In order for the contract to have been a valid contract the land should have been selected, determined and iden-

tified and it is the testimony of all witnesses in this case that no selection was ever made. The offset acreage that the contract provided that the plaintiffs were to have, had they performed the contract, was not even selected, and since there were four offsets to the drill site even this omission on their part could not be supplied.

Since the plaintiffs are claiming under alleged oral contracts, and since our courts have uniformly held that oil and gas leases are interests in real estate, then there is no means by which the plaintiffs could select their acreage, assuming that they had otherwise complied with all of the terms and conditions of their contract.

In 141 A. L. R. 814-815, this rule is found:

> "As a matter of reason, as well as of authority, the memorandum of an assignment of an oil and gas lease should identify the land affected, and the particular lease which is being assigned. If it fails to define or furnish sufficient means to identify the particular land affected, it does not satisfy the Statute of Frauds; a memorandum or an assignment of the lease should include not only the land affected, but the names of the parties to the lease; the date and term of the lease, or supply such statements by reference to some other writing, at least where the probabilities of there being more than one lease on the land is not negatived by the circumstances of the case."

In the case of *Halsell, et al.*, v. *Renfrow, et al.*, 14 Okl. 674, 78 Pac. 118, the fourth syllabus is as follows:

> "A contract for the sale of lands which a court of equity will enforce specific evidence of, must be certain in its terms and that certainty required has reference to the parties contracting, the terms of the sale and the description of the property, and whenever the property to be conveyed cannot be identified as the property referred to in the contract, specific performance will be denied."

In *Farrell, et al.*, v. *Simons,* 180 Okl. 600, 71 Pac. 688, the third syllabus is:

"A memorandum to be sufficient under Statute of Frauds must be complete in itself, and leave nothing to rest in parol, and is incomplete where parties have left essential part of agreement for future determination."

141 A. L. R. 808 states:

"A writing which affords no means of identifying is not sufficient."

70 A. L. R. 199 states:

"A memorandum which fails to disclose the name of the purchaser or to designate him so he can be identified is insufficient to satisfy the Statute; the identity cannot be supplied by parol."

Thus we say that under the Statute of Frauds the plaintiffs cannot recover irrespective of whether they are claiming under the written contract or whether they are claiming under either of the alleged oral contracts. The written contract provided that they were to have 2,000 acres of leases when they had raised $40,000.00. We do not believe that this Court will say, after having examined this record, that the plaintiffs complied with the written contract. Since they are claiming substantially the same thing under the oral contracts that is covered by the written contract we say that the Statute of Frauds more certainly applies than if the plaintiffs had relied on the written contract. In both instances they are barred completely by the Statute of Frauds.

PROPOSITION II.

The written agreement dated October 20, 1942, was void and ineffective because it was not complete.

As the Court knows, the written contract which was attached to the plaintiffs' complaint had the signatures of Ace Gutowsky as one party and of Jones and King as the other parties and after their signatures an indication was made that they had subscribed $5,000.00 each. The contract also provided that other parties were to execute the contract in order that the full sum of $40,000.00 could be raised.

It is an admitted fact that Jones and King only signed this contract. It was also admitted that none of their associates were ever asked to execute the contract by Jones and King. Therefore it was incomplete and a void instrument under the rule announced in *Edwards* v. *Lyons, et al.*, 194 Okl. 253, 149 P. (2d) 495, wherein in the first syllabus by the court, it is stated as follows:

> "A written instrument purporting to state an agreement, which to be valid must be in writing, between two or more persons as a group on the one part, and two or more persons as a group on the other part, and which shows upon its face that it is not intended to be effective and cannot accomplish the purpose shown upon the face thereof unless and until it is executed by al of the persons named, does not become a binding contract between on or more of the parties on the one part, and one or more parties on the other part, who do execute it, unless and until it is executed by all the parties named; and the signature thereto may be withdrawn by any person who has signed same at any time before it is accepted and executed by all the parties named."

It is obvious that both sides to this controversy fully anticipaed and expected that other parties, even though they were unknown, would sign the contract. It is also obvious that the contract was not complete until several people, subscribing a total of $40,000.00 to the fund, had executed the

contract. How would Gutowsky be able to enforce the contract against Jones and King in the event he had elected to do so? Suppose the well that was drilled had resulted in a dry hole and the leases thus valueless. Under what theory of law could Gutowsky bring suit on the contract and recover anything whatsoever against either Jones or King? Certainly Gutowsky would have no right of action against the people who Jones and King represented were willing to subscribe to the fund but who actually never signed the contract or otherwise entered into any agreement for the execution of said contract. If it was not binding upon Gutowsky then it would certainly not be binding upon Jones and King.

The Supreme Court of the State of Oklahoma settled the law in such situations when it rendered its decision in the *Edwards* case last referred to.

In *Steinbaum* v. *Wallace,* 176 S. W. 683, a Missouri case, the court stated:

> "An executory contract does not bind the parties unless there is mutuality of obligation."
>
> "Where contract is so lacking of mutuality of obligation that it may be cancelled or that specific performance will be denied on that ground, termination by either party creates no liability by breach."
>
> —*E. I. DuPont* v. *Claiborne-Reno Company,* 64 F. (2d) 224, 89 A. L. R. 238.
>
> "Contract * * * will not be enforced in equity so far as it is mutually executory."
>
> —26 F. (2d) 33.
>
> "Mere part performance, not binding on parties, does not make contract binding so far as it remains executory."
>
> —20 F. (2d) 738.
>
> "If one of several parties to a deed founded on mutual consent neglects to execute deed, contract is not binding on parties executing it."
>
> —*Stout* v. *Porritt,* 250 Mich. 13, 229 N. W. 409.

PROPOSITION III.

Plaintiffs cannot recover on *quantum meruit* because they have declared under express contracts.

The plaintiffs in open court have declared under two express oral contracts. The complaint and the amended complaint set up a written contract but the written contract was abandoned. One of the oral contracts declared on by the plaintiffs provided that they were to receive one-fourth of 8,000 acres which was to be segregated, thus giving them 2,000 separate acres. The second oral contract provided that they were to receive a one-sixteenth undivided interest in the 8,000 acres of leases for their services in inducing their friends to contribute to the fund. Thus both contracts are express contracts and the defendant was sued for a breach of both contracts.

In *Brown* v. *Wrightsman*, 175 Okl. 169, 51 P. (2d) 761, we find:

> "Where action for unpaid salary was based on express contract which set out amount of salary and which was alleged to have been performed by plaintiff, no recovery could be had on a '*quantum meruit*' which is based on agreement implied in law, where person performs services without a written contract, to pay what he reasonably deserves."

To the same effect is a long line of decisions in Missouri which holds:

> "In an action on an express contract, alleged to have been performed by the plaintiff, there can be no recovery on '*quantum meruit*'."

—*Wade* v. *Malone*, 119 Mo. App. 278, 95 S. W. 956;

Citing: *Houston* v. *Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795;

McDonald v. *Stevinson*, 104 Mo. App. 193, 77 S. W. 766;

Eyerman v. *Mt. Sinai Cemetery Association*, 61 Mo. 489;

Deatheiage Lbr. Co. v. *Snyder,* 65 Mo. App. 568;
Squire v. *Ferd Heim Brewing Co.,* 90 Mo. App. 462;
Cox v. *Boling,* 54 Mo. App. 289.

We find a good definition of *"quantum meruit"* in *Bills* v. *Polk,* 72 Tenn. 494, which says:

> "A *'quantum meruit'* is in the nature of an action for the value of services rendered."

This Court, when it was the Eighth Circuit, has also defined *"quantum meruit"* in this language:

> "*'Quantum meruit'* refers to class of obligations imposed by law without regard to intention or assent of parties bound, for reasons dictated by reason and justice, such obligation not being contracts though form of action is contract."
>
> —*Carpenter* v. *Josey Oil Company,* (C. C. A., Okla.) 26 F. (2d) 442.

In the body of the opinion, at page 443, we find this language:

> "The form of the action is contract but they are not contracts because the parties do not fix the terms, and their intentions are disregarded. One class of such cases is those where the party wrongfully compels another to render him valuable services and a promise to pay is implied, because on equitable grounds one ought not to be permitted to keep that which is received without compensation. But in the case at Bar the oil company has not been enriched or benefited. Further, where the relations of the parties can be ascertained from an express contract as explicit as the one at Bar, it is not necessary to resort to this legal fiction."

The distinction between *"quantum meruit"* and a suit based on an express contract is pointed out in the Missouri case of *McCormick* v. *U. S. Fidelity and Guaranty Company,* 114 Mo. App. 460, 89 S. W. 905, which quoted and

adopted the definition in Bouvier's Law Dictionary, and which is as follows:

"When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay for his services as much as he may deserve or merit. There is no doubt but what a suit on *'quantum meruit'* is a distinct cause of action from that of contract. * * * It is the settled law of the State that in a suit on contract the plaintiff cannot recover on *'quantum meruit.'* A count of a petition setting out a contract of employment on commission, and alleging performance on plaintiff's part and breach by the defendant, whereby plaintiff was prevented from doing any business and that plaintiff remained in defendant's service four and one-third months, until defendant discharged him, and by reason of defendant's said acts lost four and one-third months' time, of the value of $650.00, and in the performance of said contract incurred $50.00 expense, is for breach of contract and not *'quantum meruit'*."

West Virginia, in the case of *Lockard* v. *City of Salem,* 43 S. E. (2d) 239, has defined *"quantum meruit"* as:

"Recovery of items is on a *quantum meruit* basis which is to say 'as much as he deserves'."

Minnesota, in *Ylijarvi* v. *Brockphaler,* 213 Minn. 385, 7 N. W. (2d) 314, held:

"The basis of a recovery on a *'quantum meruit'* is that the defendant has received a benefit from the plaintiff which it is unjust for defendant to retain without paying for."

"*Quantum meruit* refers to contracts implied in fact, or to obligations imposed by law, without regard to intention or assent of parties bound for reasons dictated by reason or justice."

—*State* v. *Hailey,* 94 N. H. 69, 46 Atl. (2d) 533.

In the Oklahoma case of *Moore* v. *Craft*, 97 Okl. 128, 222 Pac. 983, we find:

> "Where an action is brought upon a *quantum meruit* for a balance of the alleged reasonable value of services rendered, and upon the trial plaintiff proves an express contract for a fixed and stated sum, which sum he admits has been paid, there is a failure of proof and not a mere variance and this failure of proof cannot be cured by proof of a custom which would add additional terms and conditions to the clear and unambiguous contract between the parties."

MR. KING (Supplemental Record, p. 42) testified in substance, when asked what his outlay of cash and expenses had been, that he spent approximately $125.00 or $150.00, and that Mr. Jones had spent about the same sum and that this represented their total cash outlay. For this expenditure, and for their efforts, which we believe this record shows conclusively did not result in any benefit whatsoever to the defendant, the trial court has rendered a judgment on "*quantum meruit*" of a one-fourth interest in the profits made by Gutowsky and Bourland, and has ordered an accounting of all of those profits involving a vast oil field.

The plaintiffs produced HARRY CULVER, JOHN CATLETT and JESS HARRIS in an effort to prove the value of the plaintiffs' services on the basis of *quantum meruit*. It is pertinent to notice however that the question asked these expert witnesses is premised on the fact that the plaintiffs did raise $40,000.00 (R. 510), and that the plaintiffs proceeded to raise $28,500.00 and advised the defendants that Wm. J. Fox was interested in the deal. In other words the question that was put to these witnesses assumed that the plaintiffs were directly responsible for contributing the entire $40,000.00 that drilled the well. We say that this record does not bear out such assumption of facts on which these witnesses based their answer. We say that the record conclusively shows that the plaintiffs did not contribute any

sum whatsoever and were not responsible for any of their friends or associates contributing any money whatsoever, and that they were in no way responsible for Wm. J. Fox finally entering into a contract with Gutowsky in December, 1942.

We, therefore, say that the answer of these witnesses is based on a fact not in evidence, is misleading and should not be considered as evidence in this case.

The evidence of Culver appears at Record beginning at page 508; the evidence of Catlett appears at Record beginning at page 512, and the evidence of Harris begins at Record, page 516.

On the other hand the defendant produced witnesses, WM. H. ATKINSON, R. OLSEN, L. G. SHINN and W. G. MAPPES. We proved conclusively by these witnesses that the value of the leases involved at the time the negotiations were taking place between the plaintiffs and the defendant, and at the time the well was drilling, was somewhere between the sum of $5.00 per acre and $10.00 per acre. MR. ATKINSON testified (R. 525), that "you could get literally thousands of acres for from $2.00 to $5.00 an acre." He further testified (R. 527), that he purchased one-half of the Bourland 1,760-acre interest, *after the pipe had been set in the well, for $5,000.00,* which included a 7/32nds interest in the drill site.

MR. R. OLSEN, an experienced oil man, testified (R. 530), that the value of the leases did not exceed $10.00 per acre.

MR. L. G. SHINN, a man who assisted in obtaining the original block, testified (R. 534), that the value of the leases was $5.00 per acre.

Based on this testimony, if the plaintiffs are entitled to have any consideration at all, a liberal valuation on the 2,000 acres involved in the deal with the plaintiffs would have been two thousand times $10.00 per acre, or $20,000.00.

Normal compensation for a *completed service* would be five per cent of $20,000.00 or $1,000.00. In other words, if plaintiffs had performed any services whatsoever and were entitled to recover anything on *quantum meruit* as the value for those services rendered, it would be the normal commission of five per cent payable on the sum involved. In this case, however, the plaintiffs did not perform any services whatsoever for the defendant. They entered into a written contract, on which they brought suit and then abandoned in open court. They then declared on two express oral contracts and the evidence shows conclusively that they never performed the terms of the alleged oral contracts. Under no theory can we see any legal right or any moral right on which the plaintiffs can base the right of recovery. Had they performed any of the alleged contracts with the defendant there would be some merit to their claim, but Gutowsky and Bourland both spent many wearisome days in an effort to get the plaintiffs to comply with the written contract, and thereafter the defendant offered to sell to the plaintiffs the same number of leases at approximately one-half of the value that they would have been required to pay for the leases on the basis of the written contract, and again the plaintiffs turned down this offer, and as a result not one cent did the defendant ever receive from the plaintiffs or from the efforts expended by the plaintiffs. We are still looking for an explanation of why the defendant would refuse $28,500.00 which the plaintiffs say was tendered to the defendant at the time the defendant made the contract with Fox.

We agree with the theory that every man is worthy of his hire, but the hired man should put forth an honest effort and give value received. Nothing whatsoever was received by the defendant in this case from the plaintiffs and it would be a rank miscarriage of justice and a travesty to permit the plaintiffs to recover anything whatsoever from the defendant, let alone one-fourth of the profits made not only by Gutowsky but by Bourland as well when the plaintiffs have contributed nothing whatsoever.

Conclusion.

We respectfully submit that the judgment of the trial court should be reversed, with instructions to the court to dismiss the action at the costs of the plaintiffs.

Respectfully submitted,

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